Supreme Court, U.S.
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No. 98-_____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

MIRTHA URBANO,
Petitioner

v.

CONTINENTAL AIRLINES, INC.,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When an employer refuses to make the same accommodation for pregnant employees as the employer routinely makes for other temporarily disabled employees, does such a practice violate the plain language of the Pregnancy Discrimination Act ("PDA") requiring that pregnant employees "shall be treated the same" as others solely with reference to their "ability or inability to work"?

2. Can the Fifth Circuit legitimately (i) ignore this Court's mandate from *Johnson Controls* that "the PDA means what it says," (ii) reject the reasoning of the Sixth Circuit, which has applied a literal interpretation of the PDA, and (iii) inject additional language beyond the PDA's intentionally specific comparison between pregnant employees and other employees solely with respect to their "ability or inability to work," in order to uphold a summary judgment in favor of an employer who refused to make the same accommodations for pregnant employees that other temporarily disabled employees received?

3. Is the Sixth Circuit's reasoning more consistent with the PDA and *Johnson Controls* than the Fifth Circuit's opposite reasoning, when an employer creates a benefits-related distinction among workers who have been temporarily disabled by "injury or illness" – allegedly based on the costs associated with whether the medical condition is job related or not job related – even if the application of such a distinction has a disparate impact on pregnant employees and the cost differential is not unduly prohibitive?

4. What is the meaning of *Hicks* in the summary judgment context or, in particular, is summary judgment defeated when evidence on each element of a Title VII prima facie case is combined with evidence supporting the fact-finder's prerogative to disbelieve an employer's explanation for an otherwise discriminatory practice?

5. Does the Fifth Circuit's standard that suspicious timing is not sufficient to support an inference of retaliation for filing a claim with the EEOC (which is inconsistent with seven other circuits, but consistent with two others) unreasonably impair the application of Title VII?

PARTIES TO THE PROCEEDINGS

The Petitioner in this case is Mirtha Urbano.

The Respondent is Continental Airlines, Inc. Petitioner is not aware of any parent companies or subsidiaries of Continental Airlines, nor has Continental Airlines identified any such affiliated entities in the proceedings below.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 8

I. THE JUDGMENT BELOW UNDERMINES THE PLAIN LANGUAGE OF THE PREGNANCY DISCRIMINATION ACT 8

A. Background of the PDA 8

B. Significance of the "ability or inability to work" standard 9

II. THE FIFTH CIRCUIT EXPRESSLY CHALLENGED THE REASONING OF THE SIXTH CIRCUIT IN ITS CONTRARY INTERPRETATION OF THE PDA, AND HIGHLIGHTS A DRASTIC SPLIT AMONG THE FEDERAL CIRCUIT COURTS THAT THIS COURT SHOULD RESOLVE 11

III. THE FIFTH CIRCUIT'S HOLDING IS DIRECTLY CONTRARY TO *JOHNSON CONTROLS*, GIVEN THAT THE EMPLOYER'S SOLE EXPLANATION FOR ITS DISCRIMINATORY PRACTICE IS COST-BASED 13

IV. THE FIFTH CIRCUIT'S JUDGMENT CONFLICTS WITH THE *HICKS* STANDARD AS APPLIED TO SUMMARY JUDGMENT PROCEEDINGS 15

A. The *Hicks* standard 15
B. *Hicks* as applied to summary judgments 16
C. Split among the Circuits 17

V. THE FIFTH CIRCUIT'S JUDGMENT REFLECTS A STANDARD FOR "SUSPICIOUS TIMING" THAT SERIOUSLY UNDERMINES RETALIATION CLAIMS, AND THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE FEDERAL CIRCUIT COURTS 18

A. "Suspicious timing" can be the most crucial issue in a retaliation claim 18

B. An extensive split among the Circuits – but a matter of first impression in this Court 19

CONCLUSION 20

APPENDIX

OPINION OF THE FIFTH CIRCUIT COURT OF APPEALS (April 15, 1998) 1a

ORDER OF THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS (November 1, 1996) 9a

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED 19a

TABLE OF AUTHORITIES

CASES **PAGE**

Bodenheimer v. PPG Indus., Inc.,
5 F.3d 955 (5th Cir. 1993) 17

California Fed. Sav. and Loan Ass'n v. Guerra,
479 U.S. 272 (1987) 8,9,10,12

Collier v. Budd Co.,
66 F.3d 886 (7th Cir. 1995) 17

Cooper v. City of North Olmstead,
795 F.2d 1265 (6th Cir. 1986) 19

Ensley-Gaines v. Runyon,
100 F.3d 1220 (6th Cir. 1996) 7,11,12,13

Fennell v. First Step Designs, Ltd.,
83 F.3d 526 (1st Cir. 1996) 19

General Electric Co. v. Gilbert,
429 U.S. 125 (1976) 8

International Union v. Johnson Controls,
499 U.S. 187 (1991) 10,11,13,14

Jalil v. Avdel Corp.,
873 F.2d 701 (3d Cir. 1989),
cert. denied, 110 S. Ct. 725 (1990) 19

Johnson v. City of Fort Wayne, Indiana,
91 F.3d 922 (7th Cir. 1996) 12

Kinkead v. Southwestern Bell Tel. Co.,
49 F.3d 454 (8th Cir. 1995) 19

Love v. Re/Max,
738 F.2d 383 (10th Cir. 1984) 19

TABLE OF AUTHORITIES

CASES (continued) **PAGE**

Mayberry v. Vought Aircraft Co.,
55 F.3d 1086 (5th Cir. 1995) 6,18,19

McDonnell Douglas Corp. v. Green,
411 U.S. 792, 802 (1973) 12

Miller v. Fairchild Indus., Inc.,
797 F.2d 727 (9th Cir. 1986) 19

Quiroga v. Hasbro, Inc.,
934 F.2d 497 (3d. Cir. 1991) 19

Reed v. A.W. Lawrence & Co.,
95 F.3d 1170 (2d Cir. 1996) 19

St. Mary's Honor Center v. Hicks,
509 U.S. 502 (1993) 15,16,17

Swanson v. General Servs. Admin.,
110 F.3d 1180 (5th Cir. 1997) 19

United States Postal Serv. Bd. Of Governors v. Aikens,
460 U.S. 711(1983) 18

Urbano v. Continental Airlines, Inc.,
138 F.3d 204 (5th Cir. 1998) .....*passim*

Washington v. Garrett,
10 F.3d 1421 (9th Cir. 1993) 17

TABLE OF AUTHORITIES

STATUTES/ RULES **PAGE**

UNITED STATES CONSTITUTION
Amendment XIV 1

UNITED STATES CODE
28 U.S.C. § 1254(1) 1
28 U.S.C. §§ 1331 4
28 U.S.C. § 1337 4
28 U.S.C. § 1343 4
28 U.S.C. § 1367(a) 4

29 U.S.C. § 2612(a)(1) 1
29 U.S.C. § 2615(a, b) 1

42 U.S.C. 2000e 4
42 U.S.C. § 2000e(k) 1,9
42 U.S.C. § 2000e-2 1
42 U.S.C. § 2000e-3 1
42 U.S.C. § 2000e-5 1,4

FEDERAL RULES OF CIVIL PROCEDURE
12 44
56 44

MISCELLANEOUS

Developments in the Law – Employment Discrimination,
HARVARD L. REV. 1568 (1996) 17

Amending Title VII, Civil Rights Act of 1964,
S. REP. NO. 95-331 (1977) 10

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at 138 F.3d 204; its text is set forth in the Appendix at pp. 1a - 8a. The opinion of the District Court for the Southern District of Texas (Houston Division) was not designated for publication; its text is set forth in the Appendix at pp. 9a - 18a.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on April 15, 1998. The judgment of the district court was entered on November 1, 1996. *See* App'x 18a. This Court has jurisdiction to review on writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The Appendix of this Petition for Writ of Certiorari at pages 19a through 24a contains the pertinent provisions of the Fourteenth Amendment to the United States Constitution; the Family and Medical Leave Act at 29 U.S.C. §§ 2612(a)(1) and 2615(a, b); the Pregnancy Discrimination Act at 42 U.S.C. § 2000e(k); Title VII of the Civil Rights Act of 1964 at at 42 U.S.C. §§ 2000e-2(a, k, m), 2000e-3(a , b), and 2000e-5(f); and Federal Rule of Civil Procedure 56.

STATEMENT OF THE CASE

Initial Background Facts

This case arises from allegations that a pregnant employee, Mirtha Urbano, suffered unlawful discrimination at the hands of her employer, Continental Airlines, Inc. ("Continental").

Mirtha Urbano began working for Continental in July of 1990. Ms. Urbano had several different positions with Continental, ultimately obtaining a full-time position as an Airport Sales Agent with bilingual interpreter status. In that capacity, her duties involved assisting customers with the purchase of airline tickets, providing flight information, checking in customers, and checking baggage.

In October of 1994, Ms. Urbano discovered she was pregnant. Ms. Urbano advised her immediate supervisor of her pregnancy, and told him she was experiencing back pain when lifting luggage. In response, the supervisor advised Ms. Urbano to take some time off from work and visit a doctor for an accurate evaluation. The supervisor also told Ms. Urbano that he would arrange for her to be placed in a "light duty" position when she returned to work. At Continental, the term "light duty" (also called "limited duty" or "transitional duty") refers to tasks that have minimal physical strength requirements, and which were routinely given to workers who suffered temporary disabilities through injury or illness. Under normal circumstances, Ms. Urbano's job required her to be able to lift luggage weighing up to 70 pounds.

Ms. Urbano did indeed visit a doctor, who restricted her from lifting anything over 20 pounds for the remainder of her pregnancy. When Ms. Urbano returned to work, she met with the Continental manager responsible for assigning light duty, and presented the doctor's note containing this restriction. The manager denied Ms. Urbano's request for light duty, declaring that Continental simply did not provide the light duty option for pregnant women. If she could not continue to lift 70 pounds while pregnant, Ms. Urbano was advised, then she could not return to

work until the baby was born or the doctor lifted the restriction. Ms. Urbano spoke to another Continental manager the same day, who reiterated Continental's policy – pregnancy was not an acceptable basis for being considered for a light duty transfer.

Over the next few months, Ms. Urbano made requests for assignment to any of three separate areas at Continental, areas which Ms. Urbano chose because she knew that there were no lifting requirements and for which she knew she was qualified – given that she had actually worked in all three areas at Continental prior to becoming an Airport Sales Agent. Ms. Urbano was again told that each request *could not even be considered.* The effect of her situation was therefore made clear: if Ms. Urbano wanted a paying position, her only options were (1) to keep working in the heavy lifting position in contrast to her doctor's orders or (2) to quit, thereby losing all seniority, and reapply like any random person off the street. Recognizing that other temporarily disabled workers at Continental were frequently given a third option – being reassigned to light duty without losing benefits or seniority – Ms. Urbano filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on March 7, 1995.

It is undisputed that Continental received formal notice from the EEOC of Ms. Urbano's charge on March 20, 1995. It is further undisputed that the very next day, on March 21, 1995, Continental prepared and sent notice to Ms. Urbano that she was being terminated, with a retroactive effective date of February 6, 1995.

Filing Suit

The EEOC proceeded to investigate the charge and, on March 30, 1995, the EEOC sent Ms. Urbano a "right to sue" letter. Having thus exhausted her administrative remedies, Ms. Urbano filed suit in the U.S. District Court for the Southern District of Texas on June 27, 1995. Among the allegations asserted by Ms. Urbano were (1) violations of the Pregnancy Discrimination Act, (2) retaliatory firing for making a charge to the EEOC about such PDA violations, (3) failure to reinstate her job after exercising the

leave authorized by the Family and Medical Leave Act, (4) retaliatory firing for making a charge to the EEOC about such an FMLA violation, and (5) a claim under Texas state law for intentional infliction of emotional distress. The bases of federal jurisdiction included the existence of federal claims (28 U.S.C. §§ 1331), issues of an employer in an industry affecting commerce (28 U.S.C. § 1337; 42 U.S.C. 2000e(b, g, h)), and issues of civil rights (28 U.S.C. § 1343; 42 U.S.C. § 2000e-5(f)(3)). The ancillary jurisdiction of the federal district court over state-law claims was invoked pursuant to 28 U.S.C. § 1367(a), because the state-law claims arose out of the same nucleus of operative facts as the federal claims and were so closely related to the federal claims that they formed part of the same case or controversy.

Faced with this lawsuit, Continental filed an answer on August 29, 1995,[1] including a new defense which had not been asserted to the EEOC nor communicated to Ms. Urbano at any time prior to the filing of the answer: that Continental did not fire Ms. Urbano; instead, the termination was allegedly retracted and she was now considered to be on medical leave of absence. During the discovery process for the lawsuit, Continental officials were forced to concede that there were no documents to support this belated assertion of an "accidental" firing; indeed, it was undisputed that Continental never made any effort to notify Ms. Urbano of the alleged "mistake" and, furthermore, the company claimed to have lost all paperwork indicating that Ms. Urbano's name was on an allegedly pre-existing list of several other people subject to administrative termination – which Continental was retracting anyway, since Continental now wanted to retain Ms. Urbano as an employee on involuntary medical leave.

Summary Judgment Motion

In June of 1996, Continental filed a motion for summary judgment, attacking all of the causes of action asserted by Ms.

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[1] A clerical error necessitated the re-issuance of a summons by the district court on August 9, 1995, thus creating an answer date more than 20 days after the initial filing of the complaint and summons on June 27, 1995. *Cf.* FED. R. CIV. P. 12(a)(1)(A).

Urbano. The essence of Continental's argument was that the PDA's mandate – pregnant employees must be treated no differently than other employees by considering solely the "ability or inability to work" – needed an extra step. Specifically, Continental asked the court to consider the *reason* underlying each employee's "ability or inability to work" and, if the court would do so, the court should thus limit the comparison of pregnant employees to workers whose reasons stemmed from off-the-job injuries or illnesses. Continental explained its twofold rationale for considering the cause underlying an employee's temporary disability as follows: (1) "Continental feels a special obligation to its employees who are injured in the line of duty" and (2) "the costs associated with an employee who has an on-the-job injury."[2] As for the ambiguous reference to "costs," *Continental never submitted any evidence of the amount or nature of such "costs"* beyond the mere conclusory assertion that they existed.

As will be explained later in this Petition, the record before the district court contained significant evidence that Continental's proffered business rationale was merely a pretext, both factually (given the record) and as a matter of law (given this Court's guidance under *International Union v. Johnson Controls*, 499 U.S. 187 (1991)).

District Court Ruling

The district court ruled in favor of Continental on all causes of action, rendering a complete summary judgment. On the issue of whether Continental's policy had an unlawful **disparate impact** on pregnant employees, the court held that if pregnant employees were compared to employees who suffered off-the-job injuries or illnesses, then there was no violation of the PDA's comparison based on an "ability or inability to work." App'x 12a-13a. The court further held that there was no statistical disparity giving rise to an inference of discrimination on a disparate impact theory, reasoning that no inferences could be taken from the evidence of

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[2] Quotations are from an affidavit attached to Continental's Motion for Summary Judgment. The affiant was Julie Strickland, who identified herself as the Director of Worker's Compensation for Continental.

only one worker receiving light duty *without* the prerequisite occupational injury or illness. App'x 13a. The court failed to address the concept that the existence of such a worker suggests something different – the selective application of Continental's allegedly "uniform" policy.

On the issue of whether Continental's policy reflected unlawful **disparate treatment** directed toward pregnant employees, the court again focused on the cause of the temporary disability and held (1) that Ms. Urbano could not be "qualified" for light duty since she did not meet the criterion of having suffered either an on-the-job injury or illness and (2) that Ms. Urbano's treatment was identical to employees who suffered off-the-job injuries or illnesses. App'x 13a. Moreover, the court again brushed aside the fact that there was evidence of at least one worker who received light duty *without* an occupational injury or illness – which would necessarily undermine Continental's protestations of a "uniform" policy.

On the issue of whether Ms. Urbano's termination was **retaliation** for filing an EEOC charge, the court cited Fifth Circuit precedent for the notion that mere timing – even under the circumstances of a one-day turnaround – is insufficient to give rise to an inference of retaliation. App'x 14a (citing *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1092 (5th Cir. 1995)). The district court added its acceptance that the termination notice was an error that was corrected, such that there was no genuine issue of retaliatory firing. App'x 14a-15a.

On the issue of Ms. Urbano's claim of **failure to reinstate under the Family Medical Leave Act ("FMLA")**, the court noted simply that Ms. Urbano was given the required 12 weeks of leave required by the FMLA and, when the leave expired in February, Ms. Urbano was still under medical restrictions and therefore unable to resume her normal duties. App'x 15a. On the issue of **retaliation under the FMLA** for filing the EEOC charge, the court again disregarded the issue of timing and, further, found no significance to the allegation that Ms. Urbano was terminated while on leave. App'x 16a.

Finally, as for Ms. Urbano's **state-law claim of intentional infliction of emotional distress**, the district court stated that its interpretation of Texas law indicated no right to such a recovery for "an ordinary employment dispute." App'x 16a-17a. And, without entertaining live testimony from Ms. Urbano or any witnesses, the court concluded that any distress Ms. Urbano may have suffered was "not severe as a matter of law." App'x 17a. The summary judgment was thereby complete.

Court of Appeals Ruling

On April 15, 1998, the Fifth Circuit panel entered its opinion and judgment, affirming the district court's ruling in all respects. The court of appeals spent the bulk of its opinion addressing the issue of disparate treatment. On that topic, the court of appeals accepted the notion that pregnant employees should be compared to workers with off-the-job injuries. App'x 4a. Thus, given that there was no different treatment between these two categories of temporarily disabled employees, the Fifth Circuit held that there was no violation of the PDA. The Fifth Circuit spent a significant portion of its opinion attacking the reasoning of a Sixth Circuit holding which was based on substantially similar facts, but where the Sixth Circuit held in *favor* of the pregnant employee. *See* App'x 5a-7a (discussing *Ensley-Gaines v. Runyon*, 100 F.3d 1220 (6th Cir. 1996)). In its most direct attack, the Fifth Circuit opined that "the rule advocated by . . . the Sixth Circuit *effectuates discrimination* contrary to the PDA . . . ." App'x 6a (emphasis added).

As for the issues of disparate impact and retaliation, the court of appeals incorporated the district court's analysis, stating simply, "We have reviewed the briefs and the pertinent portions of the record and find no reversible error. . . . [W]e affirm on these issues for essentially the reasons relied upon by the district court." App'x 2a n.1.

REASONS FOR GRANTING THE WRIT

I. THE JUDGMENT BELOW UNDERMINES THE PLAIN LANGUAGE OF THE PREGNANCY DISCRIMINATION ACT.

The plain language of the Pregnancy Discrimination Act ("PDA") indicates that the relevant comparison for a reviewing court is to contrast a pregnant employee with other employees with respect to the pregnant employee's "ability or inability to work" – period. The Fifth Circuit and the district court entered judgments below that are justified only when they add conditional language not included by Congress. In this instance, the lower courts accepted the employer's decision to distinguish job benefits among temporarily disabled workers (including pregnant women), i.e., conditioning the higher-level benefits on whether the "inability to work" was job related – a condition, of course, that pregnancy would never satisfy. Yet, such judicially contrived conditions eviscerate not only the policies underlying the Act, but also eviscerate the previous pronouncements by this Court and the pronouncements of other Circuits that have interpreted this same language.

A. Background of the PDA

At the outset, it is important to recognize the scenario that gave rise to the enactment of the Pregnancy Discrimination Act in 1978. The PDA constituted Congress's direct response to this Court's holding in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). *See California Fed. Sav. And Loan Ass'n v. Guerra*, 479 U.S. 272, 284-89 (1987) (explaining legislative history of the PDA). In *Gilbert*, this Court held that differential treatment based on pregnancy was not a gender-based classification and, therefore, pregnancy discrimination did not constitute a violation of Title VII of the Civil Rights Act of 1964. Congress responded to *Gilbert* by modifying Title VII to include language specifically addressing the issue of pregnancy.

Specifically, Congress made a single change to the definitional portion of Title VII, so that it would contain the following statement:

> . . . The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and *women affected by pregnancy*, childbirth, *or related medical conditions shall be treated the same for all employment-related purposes*, including receipt of benefits under fringe benefit programs, *as other persons not so affected but similar in their ability or inability to work*, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. . . .

42 U.S.C. § 2000e(k) (emphasis added). Thus, Congress left no room for doubt that pregnancy and related medical conditions would be treated as gender characteristics, such that employment practices directed toward pregnancy-related conditions would be subject to the same scrutiny and potential penalties as any other practices commonly understood to constitute sex discrimination.

B. Significance of the "ability or inability to work" standard

Clearly, Continental's primary accomplishment was in convincing the lower courts that the language of the PDA was not good enough; that there was some benign effect in further sub-categorization of its workers. Yet, the very *purpose* of the PDA was to protect a particular class of workers (pregnant women) who were routinely harmed by such a practice, and provide a remedy for them. *See Guerra*, 479 U.S. at 285-86. With the enactment of the PDA, Congress mandated that the employer would be forced to disregard the reason for a pregnant employee's ability or inability to work.

Continental's policy of ascertaining whether an "injury or illness" was job-related *vel non* also misses an essential point – *pregnancy is neither an injury nor an illness*. Because pregnancy did not fit Continental's default categories, Continental still needed to reach some conclusion as to where to place pregnancy –

a unique form of temporary disability – among the range of temporary disability benefits available. Continental's decision to relegate pregnant women to the bottom contravenes this Court's holding in *Guerra*.

In *Guerra*, this Court adopted the position of the lower court it was reviewing:

> We agree with the Court of Appeals' conclusion that Congress intended the PDA to be "a floor beneath which pregnancy disability benefits may not drop – not a ceiling above which they may not rise."

Guerra, 479 U.S. at 285 (quoting underlying opinion of Ninth Circuit Court of Appeals, 758 F.2d at 396). Applying this principle to the current scenario, it is clear that pregnant employees must be afforded equal benefits with the best class of workers with which they are equal based on their "ability or inability to work." In other words, it does not offend Title VII for pregnant women to be treated equally with the highest category of workers and, therefore, better than *some* employees – as long as pregnant women are not treated better than *all* employees.

Ms. Urbano was deprived of this right under the PDA by the views of the Fifth Circuit and the Southern District of Texas. In adopting Continental's argument that mere "ability or inability to work" was language that should be further modified, the lower courts went impermissibly astray. Further guidance is provided in *International Union v. Johnson Controls*, 499 U.S. 187 (1991), where this Court quoted from relevant portions of Congressional reports underlying the PDA:

> "Under this bill, the treatment of pregnant women . . . must focus not on their condition alone but on the actual effects of that condition on their ability to work. . . . [U]nder this bill, employers will no longer be permitted to force women who become pregnant to stop working regardless of their ability to continue."

Id. at 205 (quoting from *Amending Title VII, Civil Rights Act of 1964*, S. REP. NO. 95-331 at 4-6 (1977)). This Court described its

own conclusion as follows: "We do no more than hold that the PDA means what it says." *Johnson Controls*, 499 U.S. at 211.

It is clear that the rulings in both of the lower courts would have been exactly opposite if the proper statutory interpretation had been applied to Ms. Urbano's situation. This Court should not countenance the injustice done to Ms. Urbano through the lower courts' modification of this vital federal statute and misinterpretation of this Court's previous holdings on it.

II. THE FIFTH CIRCUIT EXPRESSLY CHALLENGED THE REASONING OF THE SIXTH CIRCUIT IN ITS CONTRARY INTERPRETATION OF THE PDA, AND HIGHLIGHTS A DRASTIC SPLIT AMONG THE FEDERAL CIRCUIT COURTS THAT THIS COURT SHOULD RESOLVE.

In the April 15th Opinion, the Fifth Circuit directly challenged the Sixth Circuit. Specifically, the Fifth Circuit panel accused the Sixth Circuit of outright constitutional violence: "[T]he rule advocated by . . . the Sixth Circuit *effectuates discrimination* contrary to the PDA . . . ." App'x at 6a (emphasis added).

The spark for such fiery language was the Sixth Circuit's decision in *Ensley-Gaines v. Runyon*, 100 F.3d 1220 (6th Cir. 1996). The *Ensley-Gaines* case involved a policy by the United States Postal Service which differentiated benefits among temporarily disabled workers. The plaintiff was postal employee Kim Ensley-Gaines, who became pregnant and requested an accommodation to her work duties – like Ms. Urbano. The postal service – like Continental -- had a policy of providing better accommodations to employees with work-related injuries. After the plaintiff requested and was denied her request for "limited duty" status, she instituted the proper grievance process of filing a claim with the Equal Employment Opportunity Commission ("EEOC"), which did not find sufficient evidence of discrimination. *Id.* at 1221. Ms. Ensley-Gaines then filed a lawsuit.

Upon completion of the discovery process, the postmaster filed a motion for summary judgment which was granted by the district court. The Sixth Circuit reversed the summary judgment, holding that a genuine issue of material fact existed. Specifically, the Sixth Circuit held that the plaintiff sufficiently demonstrated a prima facie case of discrimination by showing that she was similarly situated to workers who received more favorable benefits. *Id.* at 1226. That is, Ms. Ensley-Gaines was deemed "similarly situated" with workers suffering on-the-job injuries because they were all equal in terms of their "ability or inability to work." *Id.*

Such a holding, which properly limits itself to the plain language of the PDA, is in direct contrast to the Fifth Circuit's adoption of additional, conditional language. The essence of Ms. Urbano's allegations of discriminatory disparate treatment and disparate impact rest on the assumption that she is "similarly situated" with workers who suffered on-the-job injuries or illnesses. The remaining aspects of her prima facie burden are otherwise indisputable: that Ms. Urbano was a member of a protected class (pregnant women), that she could perform the light duty tasks that she requested, and that she suffered an adverse employment decision by not being granted the request for "light duty." *Cf. McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

The opposite holdings on this issue of what it means to be "similarly situated" under the PDA cannot be reconciled. It is the responsibility of this Court to resolve such conflicts.

Beyond the ultimate ruling against Ms. Urbano, part of what makes the Fifth Circuit's holding so troublesome is that it includes a number of "cheap shots" directed at the Sixth Circuit. For example (in addition to the aforementioned charge that the Sixth Circuit "effectuates discrimination"), the Fifth Circuit ridiculed the Sixth Circuit for not "citing any of the opposing circuit court decisions" – even though the Sixth Circuit's decision was firmly grounded in the language of the PDA and the language of this Court in *Johnson Controls* and *Guerra*. *Compare* App'x 7a *with*

Ensley-Gaines, 100 F.3d at 1226. Moreover, the Fifth Circuit characterized the *Ensley-Gaines* opinion as "unpersuasively" distinguishing another Sixth Circuit decision that involved a pregnant postal worker, even though that case involved facts that arose *before* the enactment of the PDA. *Compare* App'x 7a *with Ensley-Gaines*, 100 F.3d at 1225-26.

It is well established that this Court's review on certiorari is appropriate when there is a split among the decisions of two or more of the circuit courts of appeals on the same important issue. *See, e.g., Johnson Controls*, 499 U.S. at 196. The existence of such a conflict between the Fifth and Sixth Circuits could not be any clearer, nor there could there be any clearer statement of such need than the confrontational rhetoric within the Fifth Circuit's opinion. Ms. Urbano should not be left to shoulder the burden of an adverse ruling on her livelihood, based on the mere happenstance of living in the geographical jurisdiction of the Fifth Circuit rather than the Sixth Circuit.

III. THE FIFTH CIRCUIT'S HOLDING IS DIRECTLY CONTRARY TO *JOHNSON CONTROLS*, GIVEN THAT THE EMPLOYER'S SOLE EXPLANATION FOR ITS DISCRIMINATORY PRACTICE IS COST-BASED.

In *International Union v. Johnson Controls*, this Court addressed an employer's exclusion of fertile women from jobs where such women might be exposed to airborne contaminants. 499 U.S. 187 (1991). The employer offered two reasons for this policy: (1) a concern for the safety of the unborn fetuses and (2) additional costs that might arise from health care or health-related lawsuits. This Court rejected both of those reasons as having no validity under the PDA.

The Court interpreted the PDA as leaving issues of fetal safety up to the mother, noting that "[t]he beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination . . . ." *Id.* at 200. As for cost concerns, one of the more significant aspects of *Johnson Controls*

was the conclusion that "[t]he extra cost of employing members of one sex . . . does not provide an affirmative Title VII defense for a discriminatory refusal to hire members of that gender." *Id.* at 210.

Both of these conclusions are directly applicable to Ms. Urbano's allegations against Continental, and the lower courts' rulings against her on such issues. As noted in the Statement of the Case earlier in this Petition, one of the reasons offered by Continental for its "light duty" policy was that "Continental feels a special obligation to its employees who are injured in the line of duty." *Supra*, p. 5. Yet, this expression of concern, however well-intentioned, is clearly an irrelevant and invalid justification under the PDA; indeed, neither of the courts below bothered mentioning it.

On the topic of Continental's assertion regarding costs, it is worth noting again that there was no evidence before the lower courts of the amount or nature of such "costs," beyond the mere conclusory assertion that they existed. Thus, in addition to negating the concept that an on-the-job injury was some sort of bona fide occupational qualification ("BFOQ"), such a lack of evidence has added relevance: it suggests that Continental's reasons are offered as a pretext for a discriminatory motive. As will be discussed in the next section of this Petition, such evidence of pretext should have operated to prevent summary judgment in the district court, and prevented the judgment's affirmance in the court of appeals.

Returning to the discussion of *Johnson Controls*, this Court stopped short of attempting to address the situation where costs would be so prohibitive as to threaten the survival of a particular business. Of course, that issue is not implicated here anyway, because Continental never offered any evidence of exactly what its costs were, and there is no reason to assume that affording the "light duty" option to pregnant employees such as Ms. Urbano would be "inordinately expensive" for Continental. *Cf. Johnson Controls*, 499 U.S. at 224 (Scalia, J., dissenting)

In sum, Continental failed to offer any legitimate, nondiscriminatory business reason for its policy of denying workers "light duty" on the basis of pregnancy. Insofar as the lower courts' judgments were necessarily predicated on a presumption that is untenable under *Johnson Controls*, such judgments require correction by this Court.

IV. THE FIFTH CIRCUIT'S JUDGMENT CONFLICTS WITH THE *HICKS* STANDARD AS APPLIED TO SUMMARY JUDGMENT PROCEEDINGS.

A. The *Hicks* standard

In 1993, faced with "divergent views" among the circuit courts, Justice Scalia authored an opinion from this Court attempting to clarify the procedural posture and presumptions that apply in a Title VII case. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 512 (1993). As this Court enunciated in *Hicks*, a typical Title VII suit must go through a three-tiered process:

(1) the plaintiff must establish a prima facie case of discrimination under the established McDonnell Douglas criteria;
(2) the defendant then has the burden of producing evidence of a "legitimate, nondiscriminatory reason" for the adverse employment action of which the plaintiff complains; and
(3) the plaintiff must then bring forth evidence of pretext, i.e., evidence indicating that the employer's proffered explanation should not be believed and in fact represents and attempt to conceal a discriminatory motive.

Id. at 506-07. The significant aspect of *Hicks* is its holding that evidence of pretext does not give the plaintiff an automatic win; the finder of fact must still be persuaded that the "dishonest" employer was motivated by unlawful discrimination in pursuing the course of conduct giving rise to the plaintiff's claim.

B. *Hicks* as applied to summary judgments

Because *Hicks* was the result of an appeal of a bench trial, there was no explicit discussion of how its holdings would apply in the summary judgment context. Nevertheless, the discussion within *Hicks* regarding inferences and presumptions is easily applicable.

Again, the primary issue in *Hicks* was to determine what result is permitted or required if the finder of fact does not accept, or chooses to disbelieve, an employer's explanation of the employment decision of which the plaintiff complains. In resolving this issue, *Hicks* answered that "[t]he factfinder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the prima facie case, suffice to show intentional discrimination." Id. at 511. This explanation of a permissible inference thus provides a clear answer for the summary judgment context: evidence sufficient to allow the factfinder to disbelieve the employer is also sufficient to allow an inference of intentional discrimination – even though such an inference is not automatic or required.

Unfortunately, this answer was not so clear to the Fifth Circuit and the district court below. That is, despite evidence in the record indicating possible untruth in Continental's explanation of its actions regarding Ms. Urbano, the Fifth Circuit cursorily remarked that there was "no probative evidence" of pretext, without any analysis. To the contrary, the record indicated the following information:

(1) Continental never offered any information to indicate what "costs" it faced by offering light duty to pregnant employees;
(2) Continental claimed to have lost all documentation that would show whether Ms. Urbano was part of a list of employees who were "administratively" terminated;
(3) Continental never contacted Ms. Urbano to tell her that her termination was a "mistake," if indeed it was an error; and

(4) there was evidence that light duty had been provided to at least one employee without a demonstration that her injury was job related and, therefore, supporting the notion that the light-duty policy was not uniform at all.

Based on the lack of supporting facts for Continental's explanations, and the existence of some affirmative facts disputed the explanation, it cannot be said that no reasonable juror might infer disbelief of Continental and its motives. The Fifth Circuit thus denied Ms. Urbano her right to a jury trial that the principles of Hicks required on the state of this particular record.

C. Split among the Circuits

Without any guidance specifically addressing the Hicks rule in the context of summary judgment, the circuit courts have produced differing results. *See Developments in the Law – Employment Discrimination*, HARVARD L. REV. 1568, 1597-1601(1996). For instance, the Seventh and Ninth Circuits have accepted Hicks for its clear rule, and precluded Title VII summary judgment as long as there is evidence that would allow the factfinder to disbelieve an employer's explanation of its employment decision. *See, e.g., Collier v. Budd Co.*, 66 F.3d 886, 892 (7th Cir. 1995); *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993).

On the other hand, the Fifth Circuit has written specifically on this topic in another case, holding that mere evidence giving rise to disbelief is not enough for an inference of discrimination – there must be distinct evidence of specific discriminatory intent. *See Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955 (5th Cir. 1993). It is apparently this rule that the court utilized to Ms. Urbano's detriment.

This Court should resolve the split among the circuits on this issue. The inconsistency among the lower courts that gave rise to this Court's grant of certiorari for *Hicks* is appearing again on the issue of Title VII summary judgments. Indeed, this topic has importance that independently justifies a grant of certiorari. It is incumbent upon this Court to correct the erroneous application of

Hicks to Ms. Urbano's situation, and at the same time clarify the proper standard for the lower courts.

V. THE FIFTH CIRCUIT'S JUDGMENT REFLECTS A STANDARD FOR "SUSPICIOUS TIMING" THAT SERIOUSLY UNDERMINES RETALIATION CLAIMS, AND THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE FEDERAL CIRCUIT COURTS.

This is one area where the Fifth Circuit did not include information regarding this in its April 15th opinion, choosing instead to simply affirm the district court's judgment without further comment – essentially merging the two judgments into one. Yet, the district court's judgment relies on the proposition that the close timing, or "suspicious timing" of an employee's EEOC charge and subsequent termination, *ipso facto*, is not sufficient to create an inference of retaliation.

In reaching that conclusion, the district court cited *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1092 (5th Cir. 1995), as an example of the controlling Fifth Circuit standard. App'x 14a. Yet, the *Mayberry* case involved a situation where the party alleging retaliation had made the charge several *years* before the allegedly retaliatory act. Intuitively, such a situation bears a substantive difference from Ms. Urbano's, where Continental took steps to terminate her *the day after* Continental received notice of her EEOC claim.

A. "Suspicious timing" can be the most crucial issue in a retaliation claim

This Court and others have recognized that intent is often difficult to establish in the Title VII context. *See, e.g., United States Postal Serv. Bd. Of Governors v. Aikens*, 460 U.S. 711, 716 (1983) ("There will seldom be 'eyewitness' testimony as to the employer's mental processes.") Thus, it is accepted that circumstantial evidence will, sometimes be all that a plaintiff has

to offer. In that context, without a Perry-Mason-like confession from an employer, the close timing of a plaintiff's complaint vis-a-vis a subsequent adverse employment action is the next best thing. The district court's explanation of the Fifth Circuit rule that close timing is *never* sufficient provides a great blow to the adequate enforcement of Title VII.

B. An extensive split among the Circuits – but a matter of first impression in this Court

Unfortunately, this Court has never addressed this important topic, making it one of first impression here. This is surprising, given the wide disparity in the circuit court rulings over the last decade. Among the courts that have held suspicious timing to be sufficient for raising an inference of retaliation are the First, Second, Third, Fifth, Seventh, Eighth, Ninth, and Tenth Circuit Courts of Appeals. *Fennell v. First Step Designs, Lts.*, 83 F.3d 526, 535-36 (1st Cir. 1996); *Reed v. A.W. Lawrence & Co.*, 95 F.3d 1170, 1178 (2d Cir. 1996); *Jalil v. Avdel Corp.* , 873 F.2d 701, 708 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 725 (1990); *Swanson v. General Servs. Admin.*, 110 F.3d 1180, 1188 (5th Cir. 1997); *Johnson v. City of Fort Wayne, Indiana*, 91 F.3d 922, 939 (7th Cir. 1996); *Kinkead v. Southwestern Bell Tel. Co.*, 49 F.3d 454, 456 (8th Cir. 1995); *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 731(9th Cir. 1986); *Love v. Re/Max*, 738 F.2d 383, 386 (10th Cir. 1984). Among the courts that have held the opposite view are the Third, Fifth, and Sixth Circuits. *Quiroga v. Hasbro, Inc.*, 934 F.2d 497, 501 (3d. Cir. 1991) (poorly distinguishing *Jalil*); *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1092 (5th Cir. 1995); *Cooper v. City of North Olmstead*, 795 F.2d 1265, 1272 (6th Cir. 1986). As is apparent from that overview, the Third and Fifth Circuits have splits amongst themselves.

This Court should take this opportunity to resolve these conflicting opinions. Ms. Urbano would directly benefit from the correct application of the better-reasoned, majority rule.

CONCLUSION

Reviewing the lower courts' opinions it is very apparent, from their cursory handling of the facts and light legal analysis of the many significant legal issues raised by Ms. Urbano's claim, that the district court and the Fifth Circuit took a result-oriented approach to this case. A more careful review of the underlying facts and applicable law, including the precedents set by this Court, leads to but one conclusion – the lower courts' judgments are inconsistent with better-reasoned interpretations of the law.

In addition to correcting the injustice done to Ms. Urbano by the lower courts' rulings, acceptance of this case on certiorari would allow for much-needed clarification in the federal courts regarding several important and specific areas of the Pregnancy Discrimination Act, Title VII, and discrimination-based lawsuits in general. This Court should not allow the current deviations among the lower federal courts to grow even further; continued non-intervention will do a disservice to the Constitution and the equal application of civil rights laws to the citizens of the United States. This Petition has identified many areas where the Fifth Circuit has virtually demanded Supreme Court review, and Ms. Urbano hereby requests that this Court grant her request for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

COURT OF APPEALS OPINION

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

96-21115

MIRTHA URBANO,
Plaintiff-Appellant,

versus

CONTINENTAL AIRLINES, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Texas

Before REAVLEY, JONES, and BENAVIDES, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Appellant Urbano challenges the district court's holding that a company policy of granting light-duty assignments only to workers who suffer occupational injuries does not violate Title VII, as amended by the Pregnancy Discrimination Act ("PDA"). Because the PDA protects pregnant women only from being treated differently than similarly-situated non-pregnant employees, it does not guarantee light-duty assignments. We affirm the judgment as a matter of law for Continental Airlines, Inc.

BACKGROUND

In 1990, Mirtha Urbano began working for Continental Airlines in various capacities, most recently as a Ticketing Sales Agent. In that job, she assisted customers with sales and checking-

in passengers and their baggage, often lifting loads in excess of twenty pounds.

In October of 1994, Urbano learned she was pregnant. Shortly thereafter, she began suffering low-back discomfort and went to see her doctor. The doctor ordered her to refrain from lifting anything over twenty pounds for the balance of her pregnancy.

Pursuant to these instructions, Urbano requested to work in a Service Center Agent position, which does not require employees to lift heavy loads. The request was denied because Continental's transitional duty policy grants light-duty assignments only to employees who suffer an occupational injury. Employees with a nonoccupational injury or illness who would like a less physically demanding position must go through Continental's normal duty assignment system, in which employees bid for the positions of their choice, and the positions are assigned by seniority. Continental deemed Urbano ineligible under its policy for a mandatory light duty transfer. Unable to return to work and comply with her doctor's restrictions, Urbano was forced to use her accrued sick days, followed by a ninety-day family leave and then unpaid medical leave.

By March of 1995, Urbano filed charges of discrimination with the E.E.O.C. On March 30, 1995, Urbano received her right-to-sue letter and timely filed suit in federal district court, alleging, *inter alia*, a disparate treatment theory of pregnancy discrimination.

After the district court granted Continental's motion judgment as a matter of law, this appeal followed.[1]

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[1] In addition to her claim of discrimination under the theory of disparate treatment, Urbano challenges the district court's order granting judgment as a matter of law on her claims of disparate impact and retaliatory discharge under the PDA, as well as her claim of retaliatory discharge under the FMLA. We have reviewed the briefs and the pertinent portions of the record and find no reversible error. Urbano did not adduce evidence sufficient to create a genuine issue of material fact on those

APPENDIX

STANDARD OF REVIEW

This court reviews the grant of summary judgment *de novo*, applying the same standards as the district court. *See Duffy v. Leading Edge Prods., Inc.*, 44 F.3d 308, 312 (5th Cir. 1995). Summary judgment is appropriate, when, viewing the evidence in the light most favorable to the nonmoving party, the record reflects that no genuine issue of any material fact exists, and the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24, 106 S. Ct. 2548, 2252-53 (1986); *see also* Fed. R. Civ. P. 56(c). Once the movant carries his burden, "the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).

DISCUSSION

Title VII of the 1964 Civil Rights Act "prohibits various forms of employment discrimination, including discrimination on the basis of sex." *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 276-77, 107 S. Ct. 683, 687 (1987). With the passage of the PDA in 1978, Congress amended the definition section of Title VII as follows:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work ....

42 U.S.C. § 2000e(k) (1994). A claim under the PDA is analyzed like Title VII discrimination claims in general. *See Garcia v. Women's Hosp.*, 97 F.3d 810, 812-13 (5th Cir. 1996).

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claims. Accordingly, we affirm on these issues for essentially the reasons relied upon by the district court.

APPENDIX

To establish a prima facie case of discrimination under Title VII, a plaintiff may prove her claim either through direct evidence, statistical proof, or the test established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). The *McDonnell Douglas* test requires the plaintiff to show: (1) she was a member of a protected class, (2) she was qualified for the position she lost, (3) she suffered an adverse employment action, and (4) that others similarly situated were more favorably treated. *See Geier v. Medtronic*, 99 F.3d 238, 241 (7th Cir. 1996) (citing *McDonnell Douglas*, 411 U.S. at 802, 93 S. Ct. at 1824). Once the employer articulates a legitimate, nondiscriminatory reason for the employment action, however, the scheme of shifting burdens and presumptions "simply drops out of the picture," and "the trier of fact proceeds to decide the ultimate question: whether plaintiff has proved 'that the defendant intentionally discriminated against [her]' because of [her sex]." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742 (1993) (internal citation omitted).

The district court found that Urbano failed to establish the second prong of her prima facie case for disparate treatment. Specifically, the district court held that Urbano could not "provide evidence creating a genuine issue as to whether she was qualified for transfer into a light-duty position, i.e., that she sustained a work related injury." Continental also asserts that Urbano failed to offer evidence that she was treated differently under Continental's policy than other employees with nonoccupational injuries.

We agree.

Continental treated Urbano in exactly the same manner as it would have treated any other worker who was injured off the job. Light duty assignments were at a premium. Each of the forty-eight employees who received a light-duty assignment in 1994 had suffered an occupational injury. Urbano was not denied a light-duty assignment because of her pregnancy, but because her back troubles were not work related. Under the PDA, an employer is obliged to ignore a woman's pregnancy and "to treat the employee

as well as it would have if she were not pregnant." *Piraino v. International Orientation Resources, Inc.*, 84 F.3d 270, 274 (7th Cir. 1996). Thus, Continental was entitled to deny Urbano a light-duty assignment as long as it "treat[s] similarly affected but nonpregnant employees" the same. *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994); *see also Guerra*, 479 U.S. at 285-86, 107 S. Ct. at 692. Without a showing that Continental adhered to the requirements of the light-duty policy only in cases involving its pregnant workers, Urbano cannot maintain that she was a victim of discrimination under the PDA. *See Rhett v. Carnegie Ctr. Assocs.* (*In re Carnegie Ctr. Assocs.*), 129 F.3d 290, 296 (3d Cir. 1997); *Geier*, 99 F.3d at 242-43; Troupe, 20 F.3d at 738.

Urbano argues that she was physically and mentally qualified to perform the duties required for light-duty assignment, but that Continental's policy of granting light duty only to employees who are injured on the job deprived her of an employment opportunity on the basis of her pregnancy. Under this theory, employees who are unable to perform their regular duties because of their pregnancy will never be able to enjoy the same benefits as employees who suffer occupational injuries, even though these two groups are no different in their ability or inability to work. Urbano concludes that Continental's policy discriminated against her on the basis of her pregnancy and, therefore, violates the PDA.

Appellant relies heavily on the Sixth Circuit's opinion in *Ensley-Gaines v. Runyon*, 100 F.3d 1220 (6th Cir. 1996). At the heart of *Ensley-Gaines* was a Postal Service policy of granting "limited duty" assignments to employees who were injured on the job, and "light duty" assignments to employees with non-work related conditions. Because the "light duty" assignments were granted at the employer's discretion and "limited duty" assignments were granted as employee entitlements, a pregnant employee who received light duty for only a few hours a day challenged the policy as being violative of Title VII. The Sixth Circuit held that a plaintiff establishes a prima facie case of discrimination when she can demonstrate that her employer's

policy treats pregnant women differently than workers who are injured on the job. The Sixth Circuit reasoned that the PDA requires employers to treat pregnant employees in the same manner as they would other employees who were similarly situated with respect to their ability or inability to work. *See id.* at 1226. Because pregnant employees and employees who were injured on the job are no different in their ability or inability to do their work, the latter cannot receive more favorable treatment than the former.

The appellant argues that "[t]he Sixth Circuit's reasoning is sound because it would defeat the very purpose of the PDA to allow an employer to deny pregnant employees opportunities because they could not meet a qualification, that was itself discriminatory." On the contrary, the rule advocated by Urbano and the Sixth Circuit effectuates discrimination contrary to the PDA -- in favor of pregnant employees.

The PDA must be understood in the context in which it was enacted. *See Guerra*, 479 U.S. at 284, 107 S. Ct. at 691. The Supreme Court held in *General Electric Co. v. Gilbert*, 429 U.S. 125, 136-138, 97 S. Ct. 401, 408-09 (1976), that under Title VII, discrimination on the basis of pregnancy was not sex discrimination. In the wake of this decision, Congress passed the PDA, Pub. L. No. 95-555, 92 Stat. 2076 (1978). The PDA amended the definitional provision of Title VII "to specif[y] that sex discrimination includes discrimination on the basis of pregnancy." *Guerra*, 479 U.S. at 277, 107 S. Ct. at 687. In so doing, Congress "unambiguously expressed its disapproval" with the *Gilbert* decision. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678, 103 S. Ct. 2622, 2628 (1983).

Against this legislative backdrop, most courts have held that the PDA does not impose an affirmative obligation on employers to grant preferential treatment to pregnant women. *See Guerra*, 479 U.S. at 284-86, 107 S. Ct. at 691-92; *In re Carnegie Ctr. Assocs.*; 129 F.3d at 295 ("[Tlhe PDA does not require that employers treat pregnant employees better than other temporarily

disabled employees."); *Lang v. Star Herald*, 107 F.3d 1308, 1312 (8th Cir. 1997) ("[The PDA] does not create substantive rights to preferential treatment."); *Garcia*, 97 F.3d at 813 ("The PDA does not mandate preferential treatment for pregnant women . . . ."); *Armstrong v. Flowers Hosp., Inc.*, 33 F.3d 1308, 1312 (11th Cir. 1994) ("Rather than introducing new substantive provisions protecting the rights of pregnant women, the PDA brought discrimination on the basis of pregnancy within the existing statutory framework prohibiting sex-based discrimination."); *Troupe*, 20 F.3d at 738 ("The Pregnancy Discrimination Act does not . . . require employers to offer maternity leave or take other steps to make it easier for pregnant women to work . . . . "). By defining sex discrimination under Title VII to include pregnancy, Congress intended to do no more than "re-establish principles of Title VII law as they had been understood prior to the *Gilbert* decision," *Newport News*, 462 U.S. at 679, 103 S. Ct. at 2628, and ensure that female workers would not be treated "differently from other employees simply because of their capacity to bear children," *Johnson Controls*, 499 U.S. at 205, 111 S. Ct. at 1206. The Sixth Circuit drew the opposite conclusion without citing any of the opposing circuit court decisions and after distinguishing, unpersuasively, a previous case from its own court. The impact of *Ensley-Gaines* is unequivocally to treat pregnant employees who need light duty work better than other employees with a similar medical need whose conditions arose off-the-job. This is contrary to *Guerra*. 479 U.S. at 291, 107 S.Ct. at 695 (holding that while the PDA does not mandate better treatment for pregnant than nonpregnant employees, it does not pre-empt a state law that "establishes benefits that employers must, at a minimum, provide to pregnant women").

In this case, Continental treated Urbano the same as it treats any other worker who suffered an injury off duty. There is no probative evidence that Continental's distinction between occupational and off-the-job injuries was a pretext for discrimination against pregnant women or that it had a disparate impact on them. Urbano's claim is thus not a request for relief from discrimination, but rather a demand for preferential

treatment; it is a demand not satisfied by the PDA.[2] As long as pregnant employees are treated the same as other employees injured off duty, the PDA does not entitle pregnant employees with non-work related infirmities to be treated the same under Continental's light-duty policy as employees with occupational injuries.

CONCLUSION

For the foregoing reasons, the district court's order granting judgment as a matter of law in favor of the employer is AFFIRMED.

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[2] Indeed it could be argued that granting pregnant employees a benefit men are ineligible to receive is not only not required under the PDA, but it is also not permissible under Title VII, for such a policy would treat a male employee "'in a manner which but for that person's sex would be different.'" *Newport News*, 462 U.S. at 683, 103 S. Ct. at 2631 (quoting *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711, 98 S. Ct. 1370, 1377 (1978)). The PDA merely specifies that under Title VII an employer must not discriminate on the basis of a women's pregnancy; it does not "erase the original prohibition against discrimination on the basis of an employee's sex." *Newport News*, 462 U.S. at 685, 103 S. Ct. at 2632.

APPENDIX

DISTRICT COURT ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MIRTHA URBANO,	§	
Plaintiff,	§	
	§	
versus	§	CIVIL ACTION
	§	NO. H-95-3508
CONTINENTAL AIRLINES,	§	
INC.,	§	
Defendant.	§	

ORDER

Before the Court is Defendant's Motion for Summary Judgment. (Instrument No. 26). After review of the submitted papers and applicable law, the Court finds that the motion should be **GRANTED**.

I.

Plaintiff Mirtha Urbano brings this Title VII action alleging employment discrimination on the basis of sex and other related claims against her former employer, Defendant Continental Airlines.

According to the complaint, Plaintiff began working with Defendant Continental Airlines in July of 1990. (Instrument No. 1). In early October of 1994, Plaintiff was notified by a physician that she was pregnant. At the time, Plaintiff worked as a ticketing agent. Plaintiff's physician prescribed light duty from October 17, 1994 through June 10, 1995, and restricted her from lifting over twenty (20) pounds during that time period. Defendant submits evidence that Plaintiff's position as a Ticket Counter Agent required her to lift at least seventy (70) pounds.

Plaintiff requested that she be transferred to a Service Center Agent position, which does not have the lifting requirement. Defendant has a policy of providing transitional duty positions to employees who have sustained on-the-job injuries. However, the policy does not extend to employees unable to work because of pregnancy. Plaintiff's request was denied, and in early November of 1994, Plaintiff was placed on ninety-day family leave followed by unpaid medical leave until Plaintiffs physician released her from her work restrictions. Plaintiff alleges that she was denied insurance benefits for two months of her family leave. Plaintiff also asserts that on February 6, 1995, she requested and was denied transfer to a reservations position or OnePass department.

Plaintiff filed charges of discrimination with the E.E.O.C. in March of 1995. (Charge of Discrimination signed on 3/7/95, attached as Exhibit E to Plaintiff's Response, Instrument No. 37). Plaintiff received a letter dated March 21, 1995, notifying her of administrative termination of employment effective February 6, 1995.[1]

Plaintiff received notice of right-to-sue on March 30, 1995, and timely filed this action on June 27, 1995. Plaintiff alleges sex discrimination under Title VII, retaliatory discharge, intentional infliction of emotional distress, and violations of the Family Medical Leave Act ("FMLA"), *see* 29 U.S.C. §§ 2601-2654. Defendant's motion addresses all of Plaintiff's claims.

II.

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. A fact is "material" if its resolution in favor of one party might affect the outcome of the suit under governing law. Anderson v. Liberty Lobby, Inc., 106 S.

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[1] Defendant asserts that the termination was in error and that Defendant has offered unconditional reinstatement. Defendant also notes that Plaintiff's child was born last year and Plaintiff has not returned to work with Continental.

Ct. 2505, 2510 (1986). An issue is "genuine" if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. *Anderson*, 106 S. Ct. at 2510. If the evidence rebutting the motion for summary judgment is only colorable or not significantly probative, summary judgment should be granted. *Anderson*, 106 S. Ct. at 2511; *see Lewis v. Glendel Drilling Co.*, 898 F. 2d 1083, 1088 (5th Cir. 1990), *cert. denied*, 112 S. Ct. 171 (1991).

Under Fed. R. Civ. P. 56(c), the moving party bears the initial burden of informing the district court of the basis for its belief that there is an absence of a genuine issue for trial, and for identifying those portions of the record that demonstrate such absence. *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1355-56 (1986); *Leonard v. Dixie Well Serv. & Supply, Inc.*, 828 F.2d 291, 294 (5th Cir. 1987).

Where the moving party has met its Rule 56(c) burden, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts . . . [T]he nonmoving party must come forward with 'specific facts showing that there is a *genuine issue for trial*.'" *Matsushita*, 106 S. Ct. at 1356 (quoting Fed. R. Civ. P. 56(e)) (emphasis in original); *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2552 (1986); *Leonard*, 828 F.2d at 294. To sustain the burden, the nonmoving party must produce evidence admissible at trial. *Anderson*, 106 S. Ct. at 2514; *Thomas v. Price*, 975 F.2d 231, 235 (5th Cir. 1992) ("To avoid a summary judgment, the nonmoving party must adduce admissible evidence which creates a fact issue. . . . ").

III.

Title VII makes it unlawful for an employer to discriminate against an individual with respect to "compensation, terms, conditions, or privileges of employment . . . because of such individual's . . . sex . . . ." 42 U.S.C. § 2000e-2(a)(1). In 1978, Congress enacted the Pregnancy Discrimination Act ("PDA") to add that "[t]he terms 'because of sex' or 'on the basis of sex'. . . include . . . because of or on the basis of pregnancy, childbirth, or

related medical conditions . . . . " 42 U.S.C. § 2000e(k). The PDA also provides that women affected by pregnancy "shall be treated the same for all employment-related purposes, . . . as other persons not so affected but similar in their ability or inability to work . . . ." 42 U.S.C. § 2000e(k).

Two separate types of discrimination claims have been recognized under Title VII – disparate impact claims and disparate treatment claims. A disparate impact model is used for employment practices that are "facially neutral in their treatment of different groups but . . . in fact fall more harshly on one group than another and cannot be justified by business necessity. *Int'l Bd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977); *see also Anderson v. Douglas & Lomason Co., Inc.*, 26 F.3d 1277, 1284 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1099 (1995). In order to establish a disparate impact claim, Plaintiff must identify a specific employment practice "that can be shown to have a causal connection to a class based imbalance in the work force." *Anderson*, 26 F.2d at 1284 (citations and quotations omitted); *see also* 42 U.S.C. § 2000e-2(k)(1)(A).

Plaintiff asserts that Defendant's policy of allowing employees with occupational injuries to transfer to light duty has a disparate impact on pregnant employees. In view of the PDA's goal of ensuring that women affected by pregnancy be treated the same as other persons not so affected but similar in their ability or inability to work, the Court finds that the relevant comparison is between women affected by pregnancy and employees similar in their ability to work who have not sustained on-the-job injuries.

The Supreme Court has emphasized that for disparate impact cases, "statistical disparities must be sufficiently substantial that they raise . . . an inference of discrimination." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-95 (1988). Plaintiff offers evidence of forty-eight (48) employees who received transfers to light-duty positions and received medical insurance benefits. However, Plaintiff concedes that, unlike these employees, Plaintiff was denied such privileges because her injuries were not tied to an

occupational injury. Furthermore, Plaintiff offers evidence of only one employee who received a light-duty position and allegedly did not suffer a work-related injury.

Finding no genuine issue as to a disparity between persons affected by pregnancy and others similar in their ability to work who have not sustained on-the-job injuries, the Court concludes that Defendant's motion as to Plaintiff's disparate impact claim must be **GRANTED**.

IV.

In order to establish a prima facie disparate treatment case of employment discrimination, Plaintiff must prove (1) she was a member of a protected group; (2) she was qualified for an employment position; (3) she suffered an adverse employment action; and (4) she suffered from differential application of work or disciplinary rules. *Armstrong v. Flowers Hosp., Inc.*, 33 F.3d 1308, 1315 (11th Cir. 1994) (analyzing pregnancy discrimination claim).

Plaintiff fails to meet the second prima facie element because she does not provide evidence creating a genuine issue as to whether she was qualified for transfer into a light-duty position, i.e., that she sustained a work-related injury. Plaintiff also fails to meet the fourth prima facie element because she does not provide evidence creating a genuine issue as to differential application of the transfer policy. As noted in *supra* part III, Plaintiff offers evidence of only one employee who received a light-duty transfer and allegedly did not sustain a work-related injury.

Finding no genuine issue as to the second and fourth prima facie elements, the Court concludes that Defendant's motion as to Plaintiff's disparate treatment claim must be **GRANTED**.

V.

Plaintiff alleges that Defendant terminated her employment after Plaintiff filed an E.E.O.C. charge of discrimination.

APPENDIX

A prima facie case of retaliation under Title VII exists if the plaintiff establishes that (1) she participated in a statutorily protected activity, (2) she received an adverse employment action, and (3) a causal connection exists between the protected activity and the adverse action. *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1092 (5th Cir. 1995); *Collins v. Baptist Memorial Geriatric Ctr.*, 937 F.2d 190, 193 (5th Cir. 1991), *cert. denied*, 502 U.S. 1072 (1992). To establish a causal connection, the plaintiff must show that "but for" the protected activity, she would not have been subjected to the adverse action. *Mayberry*, 55 F.3d at 1092; *Collins*, 937 F.2d at 193. The timing of the adverse employment action may be a significant, but not necessarily a determinative factor. *Mayberry*, 55 F.3d at 1092.

Submissions by the parties indicate that on March 7, 1995, Plaintiff signed a charge of discrimination. Defendant received a copy of the charge at its headquarters office on March 20, 1995. The next day, Defendant mailed a notice informing Plaintiff that her employment had been terminated for Plaintiff's failure to contact Defendant at the conclusion of her family leave in February of 1995.

Defendant forwarded a copy of the charge to its operational department on March 22, 1995 for further investigation. The next day, Defendant issued a notice indicating a change in Plaintiff's status from family leave to involuntary medical leave.

Plaintiff has failed to demonstrate a genuine issue as to the third element of a prima facie Title VII retaliation claim, i.e., a causal connection between the filing of Plaintiff's E.E.O.C. charge and the termination notice. Plaintiff has offered no evidence, other than the close timing of the E.E.O.C. charge and the termination letter, indicating that "but for" the filing of the charge, Defendant would not have issued the termination notice. Defendant's evidence indicates that the termination notice was sent in error, and that Defendant subsequently changed Plaintiff's employment status from family leave to involuntary medical leave to reflect that Plaintiff may return to her former position. The Court finds

that Plaintiff's evidentiary showing is insufficient to create a genuine issue as to a retaliatory discharge claim under Title VII.

Defendant's motion as to Plaintiff's Title VII retaliatory discharge claim is **GRANTED**.

VII.

Plaintiff alleges that Plaintiff has violated the Family and Medical Leave Act by "refusing to reinstate Plaintiff to her original job, or to an equivalent job with equivalent pay and benefits . . . ." (Complaint, Instrument No. 1, at 8). Plaintiff also asserts a claim for retaliatory discharge under the FMLA.

Generally, the FMLA provides that "an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for . . . the birth of a son or daughter of the employee and in order to care for such son or daughter." 29 U.S.C. § 2912(a)(1)(A). Plaintiff does not dispute that she has received ninety days of family/medical leave.

As to the reinstatement claim, Defendant submits evidence that at the time Plaintiff's family leave expired in February of 1995, she was still pregnant and could not perform her original job because of her lifting restrictions. Plaintiff submits no contrary evidence, and also fails to indicate any specific provision of the FMLA requiring such reinstatement.

As to the retaliatory discharge claim, the FMLA makes it unlawful for an employer "to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter." 29 U.S.C. § 2915(a)(2). As to elements of proof, the FMLA provides that "[n]othing in this Act . . . shall be construed to modify or affect any Federal or State law prohibiting discrimination on the basis of . . . sex . . . . 29 U.S.C. § 2651(a). Thus, the Court assumes that the analysis used in Title VII retaliatory discharge claims also applies to Plaintiff's FMLA claim.

To support the FMLA retaliation claim, Plaintiff emphasizes the timing of the administrative discharge in relation to the filing of the E.E.O.C. charge, the fact that Plaintiff was on family leave at the time of the alleged termination, and an unsubstantiated allegation of denial of medical insurance during her family leave. Plaintiff fails to establish a genuine issue as to a causal connection between her administrative discharge and the exercise of any rights provided by the FMLA.

Accordingly, Defendant's motion as to Plaintiff's FMLA reinstatement and retaliation claims is **GRANTED**.

VIII.

As to Plaintiff's claim for intentional infliction of emotional distress, Plaintiff must prove that (1) Defendant acted intentionally or recklessly; (2) the conduct was "extreme and outrageous"; (3) the actions of Defendant caused the Plaintiff emotional distress; and (4) the resulting emotional distress was severe. *Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995); *Twyman v. Twyman*, 855 S.W.2d 619, 621-22 (Tex. 1993). Conduct is considered outrageous if it surpasses all bounds of decency such that it is "utterly intolerable in a civilized community." *Ugalde v. W.A. McKenzie Asphalt Co.*, 990 F.2d 239 (5th Cir. 1993). Even conduct that may be illegal in an employment context may not be the sort of conduct constituting extreme and outrageous conduct. *Id.*

Whether the conduct alleged by Plaintiff may reasonably be regarded as extreme and outrageous is a question of law to be addressed by the Court. *Wornick Co. v. Casas*, 856 S.W.2d 732, 734 (Tex. 1993). A claim for intentional infliction of emotional distress will not lie for mere employment disputes. *Johnson v. Merrell Dow Pharmaceuticals, Inc.*, 965 F. 2d 31, 33 (5th Cir. 1992); *Wornick*, 856 S.W.2d at 734 (wrongful discharge does not support claim for intentional infliction of emotional distress).

Plaintiffs allegations of intentional infliction of emotional distress are in the realm of an ordinary employment dispute and

cannot be said to be "extreme and outrageous." *Wilson v. Monarch Paper Co.*, 939 F.2d 1138, 1145 (5th Cir. 1991). *Compare Ugalde*, 990 F.2d 239 (5th Cir. 1993) (racial slurs and jokes do not rise to level of extreme and outrageous conduct), *Diamond Shamrock Refining & Mktg. Co. v. Mendez*, 844 S.W.2d 198, 202 (Tex. 1992) (falsely depicting plaintiff in the community as a thief does not raise fact issue of outrageous conduct) *and Clayton v. Nabisco Brands, Inc.*, 804 F. Supp. 882 (S.D. Tex. 1992) (that managers over five years were prone to yelling, were rude, accusatory and suspicious, inconsiderate, insulting and unduly critical of employee did not amount to "extreme and outrageous" conduct) *with Wilson*, 939 F.2d at 1145 (demotion of plaintiff who was college educated and had 30 years of executive experience from vice-president to entry level warehouse supervisor whose primary duties were sweeping warehouse and cleaning up after other employees in the warehouse cafeteria was extreme and outrageous conduct designed to humiliate plaintiff).

Moreover, Plaintiff's claim must also fail as a matter of law because Plaintiff has failed to establish that her emotional distress was severe. A plaintiff may recover under this tort only if her emotional distress is so severe that no reasonable person could be expected to endure it. *See Benavides v. Moore*, 848 S.W.2d 190, 195-96 (Tex. App. – Corpus Christi 1992, writ denied). Severe emotional distress does not include mere worry, anxiety, vexation, embarrassment or anger. *Regan v. Lee*, 879 S.W.2d 133, 136 (Tex.App. – Houston [14th Dist.] 1994, no writ). The Court concludes that any distress suffered by Plaintiff is not severe as a matter of law so as to allow recovery for intentional infliction of emotional distress.

Accordingly, Defendant's motion as to Plaintiff's intentional infliction of emotional distress claim is **GRANTED**.

This Order is a **FINAL JUDGMENT**.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this 1st day of November, 1996.

/s/
VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

APPENDIX

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

UNITED STATES CONSTITUTION

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

UNITED STATES CODE

Portions of the Family and Medical Leave Act

29 U.S.C. § 2612. Leave requirement

(a) In general

(1) Entitlement to leave

Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 work-weeks of leave during any 12 month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

* * * *

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

29 U.S.C. § 2615. Prohibited acts

(a) Interference with rights

(1) Exercise of rights

It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

(2) Discrimination

It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.

(b) Interference with proceedings or inquiries

It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual—

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter;

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter.

Pregnancy Discrimination Act
(amending Title VII of the Civil Rights Act of 1964)

42 U.S.C. § 2000e. Definitions

For the purposes of this subchapter –

* * * *

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their

ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. . . .

Other Relevant Provisions within Title VII of the Civil Rights Act of 1964

42 U.S.C. § 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * *

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in

subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision-making process are not capable of separation for analysis, the decision making process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice."

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

* * * *

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. §2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an

unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

(b) Printing or publication of notices or advertisements indicating prohibited preference, limitation, specification, or discrimination; occupational qualification exception

It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or otherwise training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

42 U.S.C. § 2000e-5. Enforcement provisions

* * * *

(f) Civil action by Commission, Attorney General, or person aggrieved; . . . .

(1) If . . . within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section . . . the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be

brought against the respondent named in the charge . . . by the person claiming to be aggrieved. . . .

FEDERAL RULES OF CIVIL PROCEDURE

Rule 56. Summary Judgment

* * * *

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted . . . may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. . . . The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

* * * *

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . . The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Supreme Court, U.S.
FILED
AUG 25 1998
OFFICE OF THE CLERK

(2)

No. 98-105

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ADAPTIVE POWER SOLUTIONS, LLC,
Petitioner,

v.

HUGHES MISSILE SYSTEMS COMPANY
AND RAYTHEON COMPANY,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below correctly applied well-settled antitrust doctrines in holding (1) that the rule of reason, rather than the *per se* rule, applied to respondents' alleged refusal to deal and (2) that, under the rule of reason, petitioner failed to establish the requisite injury to competition.

RULE 29.6 STATEMENT

Respondent Raytheon Company has no parent companies or non-wholly owned subsidiaries. Respondent Hughes Missile Systems Company is now known as Raytheon Missile Systems Company and is a wholly owned subsidiary of Ratheon Company. Raytheon Missile Systems Company has no non-wholly owned subsidiaries.

TABLE OF CONTENTS

STATEMENT 1

REASONS FOR DENYING THE PETITION 3

CONCLUSION 6

TABLE OF AUTHORITIES

Federal Trade Comm'n v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986) 4,5

Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985) 4

Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358 (3d Cir. 1996) 5

United States v. Johnston, 268 U.S. 220 (1925) 4

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents Hughes Missile Systems Company and Raytheon Company respectfully submit this brief in opposition to the petition for a writ of certiorari filed by petitioner Adaptive Power Solutions, LLC.

STATEMENT

1. Respondents Raytheon and Hughes are the two manufacturers of advanced medium range air-to-air missiles ("AMRAAMs") for sale to the Department of Defense. Pet App. 3a. One of the components of the AMRAAM missile is an internal power supply known as the "A3." *Id.*

In June 1995, petitioner acquired the assets of Raytheon's sole A3 supplier in a foreclosure sale. Pet App. 3a. After petitioner informed Raytheon that it would not provide any

A3s to Raytheon unless Raytheon agreed to a substantial price increase, Raytheon awarded its A3 contract to a new entrant into the A3 business. *Id.* at 4a. At approximately the same time, petitioner unsuccessfully offered to sell A3s to Hughes, which unlike Raytheon already had another supplier under contract, for a lower price. *Id.* at 3a-4a.

Petitioner sued respondents in April 1996, alleging, *inter alia*, a violation of Section 1 of the Sherman Act. Pet App. 4a. Specifically, petitioner alleged that it was unsuccessful in its attempt to sell A3s to Hughes because Raytheon convinced Hughes to join it in refusing to deal with petitioner "for the purpose and with the intent of driving [petitioner] out of the market for the manufacture of A3's." *Id.* Petitioner alleged that it went out of business due to its inability to sell A3s to Raytheon and Hughes. *Id.*

2. The district court granted summary judgment to respondents on petitioner's Section 1 claim on the ground that, under the rule of reason, there was no injury to competition. Pet App. 16a.

3. The court of appeals affirmed. The court first held that the district court had correctly held that the *per se* rule, which conclusively presumes certain categories of restraints of trade to be illegal because they virtually always restrict competition, did not apply to the restraint alleged in this case. Pet App. 5a-7a. The court of appeals then applied traditional rule of reason analysis and determined that the district court had correctly found that there was no injury to competition. The court of appeals thoroughly reviewed the evidentiary record relating to the chronology of suppliers entering, leaving and remaining in the market:

> In June 1995, [petitioner] bought Sigmapower's assets and labelled itself a competitor. So, according to [petitioner], there continued to be two competitors: [petitioner] and Oeco. In September of 1995,

> [petitioner] "was driven" out of the A3 manufacturing market and sold its A3 production equipment to SoraPower. The next month, October 1995, [Raytheon] awarded ST Keltec, a new entrant into the market, a contract to produce A3s. ST Keltec actually began producing A3s sometime later in 1995. It is not clear from the evidence when ST Keltec became "qualified" [by the DOD to product A3s]. The other new entrant, SoraPower, approached Hughes in March or April 1996 to try to obtain a contract to supply Hughes with A3s, but was not successful. Oeco continued to manufacture and sell A3s all along.

Pet. App. at 9a-10a. Based on this review, the court of appeals determined that, due to the demonstrated ease of entry in the A3 market, respondents' actions had not caused any injury to competition and, in fact, competition may have actually increased. *Id.* Moreover, the court of appeals agreed that the district court "got it right" when it concluded that petitioner's claim of injury to competition made "no economic sense." *Id.* at 13a.

REASONS FOR DENYING THE PETITION

The petition for a writ of certiorari is based entirely on the premise that the courts below erroneously applied well-settled principles of antitrust law to the particular facts of this case. Petitioner presents no unsettled questions of law or actual conflicts among federal appellate decisions, petitioner's contentions are meritless, and the questions presented are entirely factbound, particularly in light of the unique characteristics of the industry involved. The petition should be denied because it meets none of the criteria traditionally considered by this Court in granting discretionary review. *See* this Court's Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").

1. Petitioner's principal contention is that the court of appeals erred in concluding that the *per se* rule did not apply to respondents' alleged refusal to deal. *See* Pet. 6-8. The court of appeals relied on this Court's decision in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 294 (1985), in refusing to apply the *per se* rule on the ground that the alleged group boycott by Raytheon and Hughes did not disadvantage a competitor. Pet. App. 6a. Petitioner acknowledges that *Northwest Wholesale Stationers* is "the seminal decision addressing when *per se* analysis should be applied to group boycotts" (Pet. 6), but contends that the court of appeals "misconstrue[d]" that decision by "adding a formalistic gloss thereon." *Id.* at 6-7.

But the court of appeals merely followed the general rule that application of the *per se* rule is unwarranted where, as here, the challenged conduct was not directed at a competitor. *Federal Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458 (1986) ("the *per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor"). Petitioner does not take issue with that general rule, but argues only that the court of appeals should have made an exception to it under the particular circumstances of this case. Such a factbound contention regarding the application of settled law does not warrant this Court's review.

2. Petitioner next complains that the court of appeals erred in holding that the alleged group boycott was not an unlawful price-fixing conspiracy. Pet. 7-8. As the court of appeals explained, "[t]he defect in this argument is a factual one" because this case "has nothing to do with a price-fixing conspiracy." Pet. App. 7a. Review of that factual determination is unwarranted. *See United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts").

3. Petitioner's final argument is that respondents' market power is a substitute for proof of actual anticompetitive effects under the rule of reason. Pet. 9-10. This contention is based on this Court's observation that "[s]ince the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as reduction of output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'" *Indiana Fed'n of Dentists*, 476 U.S. at 460-61 (citations omitted). Petitioner would turn this well-settled antitrust principle on its head. While it makes perfect antitrust sense that a full-blown analysis of a defendant's market power is not necessary if the plaintiff can show actual detrimental effects on competition, it would make no legal or economic sense to allow a showing that respondents have market power -- and therefore have the *potential* to injure competition -- to defeat a showing that there have been no *actual* anticompetitive effects.

Contrary to petitioner's contention (*see* Pet. 9-10), the decision below does not conflict with *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358 (3d Cir. 1996), which also affirmed a grant of summary judgment on the ground that the plaintiff failed to prove injury to competition. The *Orson* court stated, in *dicta*, that market power can serve as a substitute for actual anticompetitive effect when, "[d]ue to the difficulty of isolating the market effects of the challenged conduct," proof of actual anticompetitive effect is "impossible to make." *Id.* at 1367. Regardless of the correctness of that statement, it has no application here. In this case, proof of actual anticompetitive effects was not impossible to make. Rather, as the courts below recognized, respondents affirmatively showed that there were *no* anticompetitive effects. Pet. App. 9a-10a, 16a.

4. This case presents a textbook example for the application of the rule of reason. The antitrust laws are for the benefit of competition, not competitors. The purpose of the *per se* rule is to characterize certain circumstances as *always* anticompetitive. Where, as here, there have been no anticompetitive effects as a result of the alleged restraint, the *per se* rule should not apply, nor should proof of market power be sufficient to show an injury to competition. The courts below engaged in a straightforward rule of reason analysis of the alleged restraint and correctly held, based on well-established antitrust principles, that there was no injury to competition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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August 24, 1998.

Supreme Court, U.S.
FILED
OCT 16 1998
OFFICE OF THE CLERK

(3)

No. 98-105

In The

Supreme Court of the United States

October Term, 1998

MIRTHA URBANO,

Petitioner,

vs.

CONTINENTAL AIRLINES, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED FOR REVIEW

a. Whether the District Court and the Fifth Circuit correctly ruled that, pursuant to this Court's *McDonald Douglas/Burdine* burden-shifting analysis for Title VII and PDA cases, Urbano could not and did not make out a *prima facie* case of "disparate treatment" pregnancy discrimination because, under Continental's workers' compensation transitional duty policy, pregnant employees are treated identically to other employees who are not injured on the job.

b. Whether the District Court and the Fifth Circuit correctly ruled that Urbano did not make out a *prima facie* case of "disparate impact" discrimination because she provided no evidence that the transitional duty policy's exclusion of those unable to work for non-work-related reasons fell more harshly on pregnant employees than on others with non-work-related medical restrictions and because Urbano provided no evidence that the transitional duty policy had a causal connection to a class-based imbalance in the workforce.

c. Whether the District Court and the Fifth Circuit correctly ruled that there was insufficient evidence of the causal connection necessary to prove retaliation under the PDA when the unrebutted summary judgment evidence showed that the pregnant manager responsible for sending the form termination letter when Urbano did not contact her supervisor at the expiration of her Family/Medical leave did not have knowledge of the protected activity, *i.e.*, Petitioner's filing of an EEOC charge.

STATEMENT PURSUANT TO RULE 29.6

The Respondent Continental Airlines, Inc. Continental Airlines, Inc. has no parent corporation. Its nonwholly owned subsidiaries, whether direct or indirect are:

1. Amadeus Global Travel Distribution, S.A.

2. Calair L.C.C.

3. Caljet LCC

4. Expressprop LCC

5. Vaisan Partners Limited Partnership

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Statement of the Case	1
A. Course of Proceedings and Disposition Below	1
B. Statement of Facts	2
Summary of the Argument The Petition Should be Denied	7
Reasons for Denying the Writ	8
I. Petitioner's Argument To Take The PDA Out Of Its Title VII Context Not Grounds For Certiorari.	8
II. The Decisions Of The District Court And Fifth Circuit Are Consistent With This Court's Decisions In *Newport News* And *Guerra*.	13
III. The Decisions Of The District Court And Fifth Circuit Are Consistent With This Court's Decisions In *Feeney*.	15

Contents

Page

IV. Petitioner's Request Is Nothing More Than Semantics And A Request For A Review Of The Evidentiary Findings Which Were Expressly Affirmed By The Court Of Appeals And Which Are Unworthy Of Review By This Court. 17

Conclusion 19

TABLE OF CITED AUTHORITIES

Page

Cases:

Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, 463 U.S. 1073, 103 S. Ct. 3492, 77 L. Ed. 2d 1236 (1983) .. 11

Armstrong v. Flowers Hospital, Inc., 33 F.3d 1308 (11th Cir. 1994) 15

California Federal Sav. and Loan Ass'n v. Guerra, 479 U.S. 272, 107 S. Ct. 683, 93 L. Ed. 2d 613 (1987) 7, 14, 15

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) 8

Ensley-Gaines v. Runyon, 100 F.3d 1220 (6th Cir. 1996) 7

Garcia v. Women's Hospital of Texas, 97 F.3d 810 (5th Cir. 1996) 15

General Electric Co. v. Gilbert, 429 U.S. 125, 97 S. Ct. 401, 50 L. Ed. 2d 343 (1976) 7, 14

International Union v. Johnson Controls, Inc., 499 U.S. 187, 111 S. Ct. 1196, 113 L. Ed. 2d 158 (1991) ... 11

Johnson Controls, 499 U.S. at 200, 111 S. Ct. 1204 (1977) 12

Table of Cited Authorities

Page

Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 98 S. Ct. 1370, 55 L. Ed. 2d 657 (1978) 12

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973) ..... i, 10

Newport News Shipbuilding and Dry Dock Co., v. EEOC, 462 U.S. 669, 103 S. Ct. 2622, 77 L. Ed. 2d 89 (1983) 7, 13, 15

Oncale v. Sundowner Offshore Servs., Inc., __ U.S. __, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998) 12

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979) 7, 15, 16, 17

St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993) 10, 17

Troupe v. May Dep't Stores Co., 20 F.3d 734 (7th Cir. 1994) 15

Tuohey v. Chicago Park District, 148 F.3d 735 (7th Cir. 1998) 12

White v. Frank, 1993 U.S. App. LEXIS 27066 (4th Cir. 1993) 7

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Petitioner Mirtha Urbano ("Urbano") sued her employer, Continental Airlines, Inc., ("Continental") claiming that Continental's workers compensation policy to provide transitional duty (sometimes referred to as light duty assignments) only to assist employees who have been injured on the job in decreasing their dependence on workers compensation payments by returning to work in a light-duty capacity, discriminated against her on the basis of her pregnancy in violation of the Pregnancy Discrimination Act ("PDA"). Petitioner claimed this policy constituted pregnancy discrimination under both disparate treatment and disparate impact models. Urbano also claimed that the form termination letter she received when she did not contact her supervisor at the expiration of her Family/Medical leave was an act of retaliation for filing a charge with the EEOC. Although she admitted she received 90 days of Family/Medical leave[1], Urbano claimed the form termination letter was also an act of retaliation under the Family and Medical Leave Act ("FMLA")[2]. Finally, Urbano made a state law claim for intentional infliction of emotional distress.

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1. Contrary to Petitioner's statement in support of her FMLA claim that Urbano was still on this "leave" at the time she received the form termination letter (Petition, at 6), Urbano testified she received all 90 days of her Family/Medical leave which expired on February 6, 1995, as correctly stated in the form termination letter. (R. 207A, 206). Continental provides more than the 12 weeks of leave required by the FMLA.

2. Because the Questions Presented in Urbano's Petition do not mention or refer to her claims under the FMLA, Continental assumes and submits that Urbano has waived any claims under the Family and Medical Leave Act.

The District Court granted Continental's motion for summary judgment as to all claims, and Urbano appealed to the Fifth Circuit on all claims except her state law claim for intentional infliction of emotional distress. "Because the PDA protects pregnant women only from being treated differently than similarly-situated non-pregnant employees . . . and does not guarantee light duty assignments" and because the District Court correctly granted summary judgment on all claims, the Fifth Circuit affirmed. (Fifth Circuit opinion, Petitioner's App., at 1a, 2a, n.1).

B. Statement of Facts

Because Petitioner's Statement of the Case contains numerous misstatements and omissions of fact, Continental draws the following from the record facts.

This case arises out of Continental's workers compensation policy to provide its transitional duty assignments to employees injured on the job whose physicians have prescribed restricted work activities. Whether male or female, pregnant or nonpregnant, all employees who suffer on-the-job injuries are eligible for transitional duty at Continental.[3] (R. 262).

3. Contrary to Petitioner's statement (Petition, at 2, 3, 6) alleging that light duty tasks are "routinely given to other workers" or that at least one employee who was not injured on the job nevertheless received transitional duty, the record evidence is that "[e]ach of the forty-eight employees who received a light-duty assignment in 1994 had suffered an occupational injury." (Petitioner's App., at 4a). While the District Court does note that Petitioner makes an *allegation* that one employee [Peggy Johnson] received transitional duty without an on-the-job injury (Petitioner's App., at 13a), the District Court and the Fifth Circuit did not find evidence to support Petitioner's allegation. The record evidence shows that Continental provided transitional duty to Peggy Johnson, the employee in question, beginning September 22, 1995, for an on-the-job injury described in the Employer's First Report of Injury as "Fell on Uneven Surface, Broke R. Ankle." (R. 536-535, 532-527).

Employees who are unable to perform the full scope of their duties for non-occupational reasons are not eligible for transitional duty. (R. 262). The Company's policies expressly provide: "Employees who are unable to work due to pregnancy are treated the *same* as those with any other non-occupational illness/disability." (R.261-257).

At Continental, Airport Service Agents perform a variety of tasks, including many very physically demanding ones. (R. 256). For example, Ticket Counter Agents like Urbano check-in passengers and lift passengers' luggage weighing up to 70 pounds onto the conveyor belt. (R. 256-255). Urbano does not dispute the fact that the ability to lift at least 70 pounds is an essential function of her job as an Airport Service Agent. (R. 255).

Twice a year, all Airport Service Agents bid for their preferred position and shift. (R. 255). Positions are awarded based on seniority. (R. 255). Urbano bid for and received a position as a Ticket Counter Agent at Houston's Intercontinental Airport, checking-in passengers and lifting their luggage onto the conveyor belt. (R. 255). Almost immediately after Urbano became pregnant, her physician restricted her from lifting more than 20 pounds, making her unable to perform the integral lifting function of her job. (R. 255). She asked if she could work as a Service Center Agent for the duration of her pregnancy. Assistant Director Karen Miles explained that the Service Center positions were filled, both with more senior agents who had bid for them and employees whose physicians' work restrictions (necessitated by on-the-job injuries) made them eligible for the positions through the transitional duty program. (R.255).

Like any other employee unable to perform her duties due to non-occupational reasons, Urbano used her accrued sick pay,

received 90 days of Family/Medical leave and was placed on unpaid Medical leave until she was again able to perform her job. (R. 254). In a usual pregnancy, 90 days of Family/Medical leave is more than sufficient to cover any inability to work during pregnancy as well as to recover from childbirth. However, because she obtained a lifting restriction from her doctor so early in her pregnancy, Urbano's 90 days of Family/Medical leave expired four months before her child was due. Although her Family/Medical leave was exhausted after 90 days, Urbano had approximately five years of additional unpaid Medical leave available under Continental's generous leave policy.

Unfortunately, there was a paperwork error by the Administrative Department, a completely separate department from the department for which Urbano worked. (R.247). When Urbano's Family/Medical leave expired on February 6, 1995, months before her baby was born in June 1995, Urbano appeared on the Administrative Department's list of employees whose leaves, including Family/Medical leaves, had expired and who had failed to return to work or notify the Company of their status. (R. 246). All the employees on the list[4], including Urbano, were sent a form letter administratively terminating their employment, but asking them to call if they had any questions. (R. 246). Instead of calling to rectify the obvious error, (R. 203), or grieving through Continental's internal grievance procedure which provides a multi-level appeal for dispute resolution to a third-party arbitrator if necessary (R. 246-245), Urbano sued.

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4. Contrary to petitioner's statement that this list was "lost" (Petition, at 4, 16), Kimberly Joseph, the pregnant Manager of Administration who took personal responsibility for incorrectly sending out the form termination letter, testified that she simply no longer had the lists which were computer-generated and came out approximately monthly.

As soon as Urbano applied for unemployment benefits, Continental notified the Texas Employment Commission ("TEC") that Urbano had not been terminated, but had been placed on a leave of absence. Contrary to Petitioner's statement (Petition, at 4, 16) that Urbano was never notified of the error or its correction,[5] Urbano testified she did not remember whether or not she learned through the TEC process that Continental had corrected the termination error and changed her employment status to a leave of absence status. (R. 201). In any case, on her attorney's advice Urbano refused to contact Continental to notify Continental of the error. (R. 194A).

As soon as she sued, the Company's answer in this litigation stated that she had not been terminated, and Continental offered unconditional reinstatement if there was any doubt. On the advice of her counsel, Urbano refused and continues to refuse to contact Continental or to return to her former position, even though her physician released her to return to full duty after the birth of her child in June of 1995, over 3 years ago. (R. 215B, 201, 199B, 194A-195). As of Continental's last information, Urbano remains a full-time homemaker and mother.

In addition to the numerous misstatements of fact noted herein, Petitioner's Statement of the Case omits a number of crucial facts. Urbano provided no statistical evidence[6] of any

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5. Contrary to Petitioner's statement that Urbano's inadvertent termination was a "new defense" not asserted to the EEOC (Petition, at 4), Petitioner requested an immediate right-to-sue from the EEOC such that Continental had no opportunity to file a position statement to the EEOC at all. (R. 203).

6. While Petitioner correctly notes (Petition, at 8) that pregnancy would never satisfy the requirement of a physical work restriction caused

(Cont'd)

kind to support her bare claim that Continental's policy produced the sort of class-based imbalance in the workforce necessary for a disparate impact claim. Urbano produced no evidence that the policy was adopted or enforced as a means of intentional pregnancy discrimination. Urbano produced no evidence of a causal connection between the paperwork error by the pregnant Administrative Manager responsible for the form termination letter and Petitioner's protected activity of filing the EEOC charge. Urbano presented no evidence to rebut Continental's summary judgment evidence that, at the time she sent the termination letter, the same pregnant Administrative Manager had no knowledge of Petitioner's EEOC charge, received by Continental Diversity department at another location.[7] Finally, while she complains only now about the lack of a dollar amount of Continental's cost justification for the transitional duty policy, Urbano performed no discovery to determine it. Therefore, in addition to Petitioner's lack of meritorious legal arguments, the Fifth Circuit also correctly

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(Cont'd)
by an occupational injury, the same is true of vacation injuries, non-occupational car wrecks, cancer, etc. Petitioner omits to note that, like any other employee, a pregnant employee is eligible to receive transitional duty if she is injured on the job while pregnant.

7. The administrative-termination form letter is dated March 21, 1995. The Director of Diversity received Urbano's EEOC charge at Continental's downtown headquarters on March 21, 1995. (R. 129-123). The Diversity department mailed it from the downtown headquarters location to the Intercontinental Airport location to Urbano's operational department by memorandum dated March 22, 1995. (R. 129-123). The operational department Urbano claims discriminated against her on the basis of her pregnancy did not receive the charge of discrimination until after the termination letter had been sent. The Administrative Department that decided to send and sent the termination letter did not receive notice of Urbano's charge of discrimination until the discovery period of this lawsuit. (R. 247-245).

affirmed summary judgment in Continental's favor for her lack of evidence to support her claims.

SUMMARY OF THE ARGUMENT THE PETITION SHOULD BE DENIED

Petitioner suggests that this Court should grant *certiorari* in this case for the purpose of announcing a bright-line test that pregnant employees must receive preferential treatment[8] in light duty programs over others with non-occupational work restrictions[9]. Such a rule would go beyond the requirements of equal treatment which are the foundation of Title VII and the PDA and would not comport with this Court's classic Title VII analysis, or its decisions in *Newport News Shipbuilding and Dry Dock Co., v. EEOC*, 462 U.S. 669, 103 S. Ct. 2622 , 77 L. Ed. 2d 89 (1983); *California Federal Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 107 S. Ct. 683, 93 L. Ed. 2d 613 (1987); and *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979). Because the purpose of the PDA was to return the law to pre-*Gilbert* Title

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8. Petition at 10 ("In other words it does not offend Title VII for pregnant women to be treated equally with the highest category of workers and therefore, better than *some* employees — as long as pregnant women are not treated better than *all* employees."). This is the point at which the Fifth Circuit noted the argument that such preferential treatment of pregnant workers discriminates against men who, solely because of their sex, could never be eligible such a pregnancy exception. (Petitioner's App., at 8a, n.2).

9. The only rationale for accepting *certiorari* would be to overturn the poorly-reasoned opinion in *Ensley-Gaines v. Runyon*, 100 F.3d 1220 (6th Cir. 1996) requiring preferential treatment of pregnant workers, in favor of the better-reasoned, equal-treatment opinions of the Fifth Circuit herein and the Fourth Circuit in *White v. Frank*, 1993 U.S. App. LEXIS 27066 (4th Cir. 1993) (*See* 5th Circuit Brief of Appellee at Appendix A-1).

VII analysis, such a bright-line test would also constitute inappropriate judicial legislation, quashing these win-win policies benefiting employees injured on the job, and creating new rights and privileges for a special few at the expense of the remainder. The Fifth Circuit correctly affirmed summary judgment in favor of Continental both because of its meritorious legal points and because Petitioner failed to meet her burden under *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), to produce evidence of a necessary fact issue to avoid summary judgment. Petitioner's remaining points are unworthy of this Court's attention because they are mere semantic arguments attempting to create a split in the Circuits where none exists and to try to obtain another level of evidentiary review.

REASONS FOR DENYING THE WRIT

I.

PETITIONER'S ARGUMENT TO TAKE THE PDA OUT OF ITS TITLE VII CONTEXT NOT GROUNDS FOR CERTIORARI.

Although Petitioner accuses the Fifth Circuit of "light" legal analysis, Petitioner's complaint seems to be that the Fifth Circuit analyzes Urbano's claim of intentional pregnancy discrimination in accordance with classic Title VII principles.

> To establish a prima facie case of discrimination under Title VII, a plaintiff may prove her claim either through direct evidence, statistical proof, or the test established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). The *McDonnell Douglas* test requires the plaintiff to show: (1) she was a member of a protected class, (2) she was qualified

for the position lost, (3) she suffered an adverse employment action, and (4) that others similarly situated were more favorably treated. *See Geier v. Medtronic*, 99 F.3d 238, 241 (7th Cir. 1996) (citing *McDonnell Douglas*, 411 U.S. at 802, 93 S. Ct. at 1824). Once the employer articulates a legitimate, nondiscriminatory reason for the employment action, however, the scheme of shifting burdens and presumptions "simply drops out of the picture," and "the trier of fact proceeds to decide the ultimate question: whether plaintiff has proved 'that the defendant intentionally discriminated against [her]' because of [her sex]." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742 (1993) (internal citation omitted).

The district court found that Urbano failed to establish the second prong of her prima facie case for disparate treatment. Specifically, the district court held that Urbano could not provide evidence creating a genuine fact issue as to whether she was qualified for transfer into a light-duty position, i.e., that she sustained a work related injury. Continental also asserts that Urbano failed to offer evidence that she was treated differently under Continental's policy than other employees with nonoccupational injuries.

We agree.

Continental treated Urbano in exactly the same manner as it would have treated any other worker who was injured off the job. Light duty assignments were at a premium. Each of the forty-eight employees who received a light duty assignment in

> 1994 had suffered an occupational injury. Urbano was not denied a light-duty position because of her pregnancy, but because her back troubles were not work related.
>
> . . .
>
> There is no probative evidence that Continental's distinction between occupational and off-the-job injuries was a pretext for discrimination against pregnant women or that it had a disparate impact on them. Urbano's claim is thus not a request for relief from discrimination, but rather a demand for preferential treatment; it is a demand not satisfied by the PDA. As long as pregnant employees are treated the same as other employees injured off duty, the PDA does not entitle pregnant employees with non-work related infirmities to be treated the same under Continental's light duty policy as employees with occupational injuries.

(Petitioner's App., at 4a, 7a-8a.). Because the Fifth Circuit did no more than follow this Court's time-tested, *McDonnell Douglas* burden-shifting Title VII analysis, this case is not deserving of *certiorari*.

In fact, by referring to this Court's decision in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993), Petitioner impliedly admits that the *McDonnell Douglas* burden-shifting analysis normal to Title VII cases applies to an analysis of a pregnancy discrimination case. (Petition, at 15). Yet, Petitioner seeks *certiorari* for the proposition that two of the four prongs of the *McDonnell Douglas prima facie* case do not apply to pregnancy claims, *i.e.*, Urbano need not show that she is qualified for the position

she seeks by demonstrating that her lifting restriction is caused by an on-the-job injury and Urbano need not demonstrate that she is similarly-situated to those who receive transitional duty (injured on the job) so long as she shows she is temporarily disabled. In further avoidance of the hallmark Title VII analysis, Petitioner seeks *certiorari* for the proposition that Continental must do more than articulate its legitimate, nondiscriminatory business reason for the policy[10]. Finally, Petitioner asserts she need not offer evidence that the policy in favor of those injured on the job is a pretext, or cover-up for intentional pregnancy discrimination, the *sine qua non* of a discrimination case.[11]

This Court has long recognized that "the purpose of the PDA was simply to make the treatment of pregnancy consistent with general Title VII principles." *International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 218, 111 S. Ct. 1196, 1213, 113 L. Ed. 2d 158 (1991) (White, J., concurring in part and concurring in the judgment), *citing, Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1085, n.14, 103 S. Ct. 3492, 3499-3500, n.14, 77 L. Ed. 2d 1236 (1983). While the PDA redefines sex discrimination to include pregnancy and related

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10. Petitioner considers Continental's first reason, that it feels a special obligation to those injured in the line of duty, well-intentioned but irrelevant and invalid. (Petition at 14). Petitioner considers Continental's second reason, the cost savings associated with reduced workers compensation payments and workers compensation supplements arising from an earlier return to work, insufficient "because Continental never offered any evidence of exactly what its costs were. . . ." (Petition at 14).

11. Petition, at 16-17. (Claiming jurors should be permitted to disbelieve that Continental's policy simply favors those injured on the job).

conditions, "it does not change the application of Title VII to sex discrimination in any other way." *Johnson Controls*, 499 U.S. at 219, 111 S. Ct. at 1214 (White, J., concurring in part and concurring in the judgment), *citing*, Senate Report No. 95-331, pp. 3-4 (1977). This Court has analyzed a policy attacked under the PDA by virtue of a "simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.' " *Johnson Controls*, 499 U.S. at 200, 111 S. Ct. at 1204, *citing*, *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 711, 98 S. Ct. 1370, 1377, 55 L. Ed. 2d 657 (1978). Continental's transitional duty policy easily passes this test, as well as analysis under classic Title VII principles, because had Urbano not been pregnant or even had she been male, she still would not have been eligible for the program because she was not injured on the job. "To establish discrimination, [plaintiff] was required to show that she was treated differently than other employees because of her pregnancy." *Tuohey v. Chicago Park District*, 148 F.3d 735, 740 (7th Cir. 1998). Under Title VII, the critical issue is whether members of one sex are exposed to disadvantageous terms or conditions to which members of the other sex are not exposed. *Oncale v. Sundowner Offshore Servs., Inc.*, __ U.S. __, __, 118 S. Ct. 998, 1002, 140 L. Ed. 2d 201 (1998). Urbano cannot show differential treatment based on her pregnancy.

The petition for a writ of *certiorari* should be denied because Petitioner's position is no more than a frontal assault on well-established Title VII principles in an attempt to provoke judicial legislation in favor of preferential treatment of pregnant workers at the expense of their coworkers.

II.

THE DECISIONS OF THE DISTRICT COURT AND FIFTH CIRCUIT ARE CONSISTENT WITH THIS COURT'S DECISIONS IN *NEWPORT NEWS* AND *GUERRA*.

In *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 685, 103 S. Ct. 2622, 2632, 77 L. Ed. 2d 89 (1983), this Court held that a limitation in an employer's health insurance plan, which provided female employees with benefits for pregnancy-related conditions to the same extent as for other medical conditions but which provided less extensive pregnancy benefits for spouses of male employees, discriminated against male employees in violation of Title VII, as amended by the PDA. While the case at bar concerns Continental's transitional duty program rather than disability insurance or any other fringe benefit, *Newport News* provides crucial and careful analysis of the legislative history of the PDA. Both the majority[12] and the dissent[13] in *Newport News* agree that Congress' purpose and

12. *Newport News*, 462 U.S. at 670, 103 S. Ct. at 2624 (Congress "overruled" Gilbert by amending Title VII with the PDA); 462 U.S. at 678, 103 S. Ct. at 2628 ("When Congress amended Title VII in 1978, it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision."); 462 U.S. at 679, 103 S. Ct. at 2628-29 (purpose of PDA to reestablish Title VII principles as they had been understood prior to *Gilbert*) 462 U.S. at 679, 103 S. Ct. at 2629, n.17 (collecting legislative history regarding Congress' purpose simply to provide corrective legislation to restore law to pre-*Gilbert* status).

13. *Newport News*, 462 U.S. at 686, 103 S. Ct. at 2632-33 ("... there is no question but what the Pregnancy Discrimination Act manifests Congressional dissatisfaction with the result we reached in *Gilbert*."); 462 U.S. at 690, 103 S. Ct. at 2634-35 (Congressional Record on PDA overflowing with Congress' intention to assure equal treatment); 462 U.S. at 690 n.5, 103 S. Ct. at 2634-35 n.5 (footnote collecting legislative history regarding Congress' intention in enacting PDA to assure equal treatment).

result in enacting the PDA was to reestablish toward pregnancy the equal-treatment principles of Title VII law as they had been understood prior to the *Gilbert*[14] decision.

This Court has also held that Title VII did not preempt a California statute providing limited preferential treatment toward pregnant women in the form of qualified reinstatement. *California Federal Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 292, 107 S. Ct. 683, 695, 93 L. Ed. 2d 613 (1987). Although *Guerra* is a highly-fractured decision on the question of whether the equal-treatment principles of Title VII preempt the preferential treatment required by the California statute, again both the majority[15] and the dissent[16] agree at least that Title VII does not *require* preferential treatment toward pregnant employees, with the dissent steadfastly maintaining that the equal-treatment language of the PDA does not permit preferential treatment.

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14. *General Electric Co. v. Gilbert*, 429 U.S. 125, 97 S. Ct. 401, 50 L. Ed. 2d 343 (1976).

15. *Guerra*, 479 U.S. at 286, 107 S. Ct. at 692 ("... the legislative history [of the PDA] is devoid of any discussion of preferential treatment of pregnancy, beyond acknowledgments of the existence of state statutes providing for such preferential treatment."); 479 U.S. at 288, 107 S. Ct. at 692 ("On the contrary, if Congress had intended to *prohibit* preferential treatment, it would have been the height of understatement to say only that the legislation would not *require* such conduct. It is hardly conceivable that Congress would have extensively discussed only its intent not to require preferential treatment if in fact it had intended to prohibit such treatment.").

16. *Guerra*, 479 U.S. at 303-304, 107 S. Ct. at 701 (legislative history specifically indicated the PDA does not mandate benefits or other preferential treatment for pregnant employees).

The Fifth Circuit and other Circuits have followed this Court's decisions that the PDA does not mandate preferential treatment. *Garcia v. Women's Hospital of Texas*, 97 F.3d 810, 813 (5th Cir. 1996); *see also Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994). ("The Pregnancy Discrimination Act does not, despite the urgings of feminist scholars . . . require employers to offer maternity leave or take other steps to make it easier for pregnant women to work . . . to make it as easy, say, as it is for their spouses to continue working during pregnancy."); *Armstrong v. Flowers Hospital, Inc.*, 33 F.3d 1308, 1316 (11th Cir. 1994) (a claim that an employer must make alternative work available for pregnant employees "is more accurately viewed as an effort to secure preferential treatment for pregnant employees."). Because Continental declines to provide preferential treatment to pregnant employees (as specifically allowed by *Guerra)* in its workers compensation "transitional duty" program, but does treat pregnant employees equally with other employees not receiving workers compensation benefits in accordance with the principles announced in *Newport News*, *certiorari* would not be appropriate in this case.

III.

THE DECISIONS OF THE DISTRICT COURT AND FIFTH CIRCUIT ARE CONSISTENT WITH THIS COURT'S DECISIONS IN *FEENEY.*

In *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 275, 99 S. Ct. 2282, 2294, 60 L. Ed. 2d 870 (1979), this Court carefully noted that policies in favor of a deserving, non-protected class of employees or applicants (veterans) are not violative of equal protection principles. The veterans' preference statute did not deprive women of equal protection of the laws because the statute was a preference for

veterans of either sex over nonveterans of either sex, not for men over women. *Feeney*, 442 U.S. at 279, 99 S. Ct. at 2296-97. Similarly, Continental's workers compensation program provides transitional duty to those, male or female, pregnant or nonpregnant, who are injured on the job. Veterans preferences are both common and justified on the basis of rewarding veterans for the sacrifice of military service, to ease the transition from military to civilian life, to encourage patriotic service, and to attract loyal and well-disciplined people to civil service occupations. *Feeney*, 442 U.S. at 265, 99 S. Ct. at 2289. Similarly, Continental's transitional duty program rewards the sacrifices of those injured on the job and eases their transition from workers compensation benefits to normal, unrestricted duty.

Rewarding the sacrifices of those injured on the job, like the rationale for veterans preferences, is a legitimate and worthy purpose, not created as a pretext for pregnancy discrimination. *See Feeney*, 442 U.S. at 274-75, 99 S. Ct. at 2294. Moreover, in the same way that a significant number of male nonveterans are affected by a veterans preference, a significant number of nonpregnant employees[17] are affected by the transitional duty program's limitation to those injured on the job. *See Feeney*, 442 U.S. at 275, 99 S. Ct. 2294 ("Too many men are affected

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17. Although not violative of equal protection privileges, veterans preferences severely impact women. *See Feeney*, 442 U.S. at 270, 99 S. Ct. at 2292. However, because pregnant and nonpregnant employees are at best equally disadvantaged by the injured-on-the-job limitation of Continental's transitional duty program, Urbano has not and cannot produce a single statistic suggesting the limitation falls more harshly on pregnant employees than nonpregnant employees. In fact, nonpregnant employees with long-term illnesses or injuries incurred off the job, such as cancer or severe car wreck victims, would seem to be more disadvantaged simply because of the relatively short disability period of a normal pregnancy.

by [the veteran's preference statute] to permit the inference that the statute is but a pretext for preferring men over women."). The *Feeney* Court stated: ". . . the law remains what it purports to be: a preference for veterans of either sex over nonveterans of either sex, not for men over women." *Feeney*, 442 U.S. at 279, 99 S. Ct. 2296-97. Similarly, Continental's workers compensation program remains what it purports to be, a valuable program for those injured on-the-job of either sex, not a program for the nonpregnant over the pregnant. Because Continental's workers' compensation program comports with *Feeney, certiorari* would not be appropriate in this case.

IV.

PETITIONER'S REQUEST IS NOTHING MORE THAN SEMANTICS AND A REQUEST FOR A REVIEW OF THE EVIDENTIARY FINDINGS WHICH WERE EXPRESSLY AFFIRMED BY THE COURT OF APPEALS AND WHICH ARE UNWORTHY OF REVIEW BY THIS COURT.

Petitioner has two additional claims that there is a split in the Circuits. However, the alleged distinctions are mere semantics which do not rise to the level of a conflict at all. First, Petitioner tries to "create" a split in the Circuits on the necessary level of proof for evidence of pretext under *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993), seeking *certiorari* for alleged distinctions between "evidence" and "distinct evidence". (Petition, at 17). Next, Petitioner tries to create a split in the Circuits on the necessary level of proof for evidence of retaliation based on timing alone, apparently seeking *certiorari* on whether the inference should be rebuttable. (Petition, at 18-19). More egregiously, and with a notable lack of citation to the District Court's opinion in her own appendix, Urbano incorrectly states

(Petition, at 19): "The district court's explanation of the Fifth Circuit rule that close timing is *never* sufficient provides a great blow to the adequate enforcement of Title VII." (Emphasis in original). A correct statement and a direct quote of the district court's holding is: "The timing of the adverse employment action may be a significant, but not necessarily determinative factor." (Petitioner's App., at 14a). In the face of record evidence that the pregnant decisionmaker did not know of Petitioner's protected activity, (R. 129-123, 247-245), and Petitioner's admission that timing alone was her only claim to a retaliation cause of action (R. 200, 194-194A), Petitioner's request for *certiorari* on this alleged issue comes perilously close to failing to be candid with this Court. These are more attempts, like misstatement and omissions of the record evidence, to get another bite at the apple of evidentiary review. The Fifth Circuit not only correctly affirmed summary judgment on these matters, they do not raise any significant issue of law worthy of this Court's attention.

CONCLUSION

Because the Fifth Circuit and the District Court acted in accordance with this Court's equal-treatment jurisprudence under Title VII and the PDA and because Urbano has simply failed to put forward probative evidence in support of any of her claims, this case is not appropriate for *certiorari*.

Respectfully submitted,

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No. 98-105

FILED

OCT 30 1998

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MIRTHA URBANO,
Petitioner

v.

CONTINENTAL AIRLINES, INC.,
Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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14 pp

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

PETITIONER'S REPLY TO BRIEF IN OPPOSITION 1

I. INTRODUCTION. 1

II. CONTINENTAL'S NEWLY FASHIONED LABEL – "WORKERS COMPENSATION PROGRAM" – ACTUALLY PROVES TOO MUCH. 1

A. Little "w," little "c," little "p" 1

B. Capital "L," Capital "D": The Limited Duty program in operation 2

C. A ruse is a ruse is a ruse 3

III. WHAT WE REALLY WANT. 4

A. Ms. Urbano's actual arguments 5

B. Other irrelevancies raised by Continental 6

IV. "THE WHOLE WORLD IS WATCHING": THIS CASE IS INDEED WORTHY OF CERTIORARI REVIEW. 7

V. "JUST WALK BESIDE ME": A CONCLUSION. 10

TABLE OF AUTHORITIES

CASES **PAGE**

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 6

Ensley-Gaines v. Runyon,
100 F.3d 1220 (6th Cir. 1996) ..... 10 & n.9

International Union v. Johnson Controls,
499 U.S. 187 (1991) 3

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 5

Personnel Administrator of Massachusetts v. Feeney,
442 U.S. 256 (1979) 2

St. Mary's Honor Center v. Hicks,
509 U.S. 502 (1993) 8

Troupe v. May Dep't Stores Co.,
20 F.3d 734 (7th Cir. 1994) 8-9

United States Postal Serv. Bd. Of Governors v. Aikens,
460 U.S. 711 (1983) 8

Urbano v. Continental Airlines, Inc.,
138 F.3d 204 (5th Cir. 1998) ..... *passim*

STATUTES/ RULES

FEDERAL RULES OF CIVIL PROCEDURE
56 5

SUPREME COURT RULES
10 8
15.2 ..... 6 n.6

TEXAS LABOR CODE
§§ 401.001-418.002 (Texas Workers' Comp. Act) 2 n.3

TABLE OF AUTHORITIES

STATUTES/ RULES (continued) **PAGE**

UNITED STATES CODE
29 U.S.C. § 2615(a, b) 9 n.7
42 U.S.C. § 2000e(k) (Pregnancy Discrimination Act)..*passim*

MISCELLANEOUS

Albert Camus, "Friends" (a poem) .....10 & n.10

Developments in the Law – Employment Discrimination, 109 HARV. L. REV. 1568 (1996) 8

Thomas Duley, *Summary Judgment and Title VII after* Hicks*: How Much Evidence Does it Take to Make an Inference?*, 28 U.C. DAVIS L. REV. 261 (1994).....8

NBC Nightly News with Tom Brokaw: "The Sex War – Pregnancy" (NBC television broadcast, Oct. 24, 1997, story reported by Andrea Mitchell).....10

Jody H. Odell, *Between Pretext Only and Pretext Plus: Understanding* St. Mary's Honor Center v. Hicks *and its Application to Summary Judgment*, 69 NOTRE DAME L. REV. 1251 (1994).....8

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

I. INTRODUCTION.

Where do we begin? Respondent Continental's Brief contains so many irrelevant and misleading assertions of the underlying facts, the applicable case law, and Petitioner's arguments, that it is difficult to ascertain how best to refocus this Court on the appropriate considerations regarding whether to grant a writ of certiorari. The following represents our best attempt at clarification.

II. CONTINENTAL'S NEWLY FASHIONED LABEL – "WORKERS COMPENSATION PROGRAM" – ACTUALLY PROVES TOO MUCH.

A. Little "w," little "c," little "p"

Perhaps the best place to start is with Continental's innovative (and repeated) description of its light-duty policy as a "workers compensation program"[1] or "workers compensation policy."[2] That terminology can be used only in a generic sense, insofar as *the record does not indicate that any officially titled "Workers' Compensation Program" ever existed at Continental.* Indeed, this Court might notice that the words "workers' compensation" are not mentioned anywhere within the challenged opinions of the Fifth Circuit and district court. That is most likely because Continental *never used* the terms "workers' compensation program" or "workers' compensation policy" at any stage of this litigation before now – i.e., *not* in any pleadings to the district court, *not* in its summary judgment motion, *not* in any briefs to the Fifth Circuit, and *not* in the oral arguments to the Fifth Circuit.

Presumably, Continental now invokes that quasi-official-sounding label to suggest a formal link between its light-duty policy and the workers' compensation laws. Yet, in truth, such a program is not in any way contemplated or required by the workers'

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[1] *See* Resp. Brf. at 15, 16, 17.

[2] *See* Resp. Brf. at *i*, 1, 2.

compensation statutes of the State of Texas.[3] Thus, to the extent that Continental's particular policy of providing light duty was created solely by and for the company's own use, the policy is not due the same deference as legislative enactments.

Accordingly, Continental's reliance on the case of *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), is misplaced. *Cf.* Resp. Brf. at 15-17 (asserting that the decisions of the Fifth Circuit and the district court below should be sustained because they are allegedly consistent with *Feeney*). In *Feeney*, this Court reviewed a policy created by the Massachusetts legislature whereby military veterans were given a hiring preference over other employment applicants. This Court upheld that policy as not constituting unlawful sex discrimination, largely on the recognition of a state government's general prerogative to create job classifications that "bear a close and substantial relationship to important governmental objectives." *Feeney*, 442 U.S. at 273. Obviously Continental, as a private employer, is not in a position to decide what the government's objectives are; indeed, Continental makes no claims that its light duty policy is reflective of any general public policy. The light duty policy must, therefore, stand or fall based on typical Title VII analysis.

B. Capital "L," capital "D": The Limited Duty program in operation

According to the portion of Continental's policy and procedures manual reproduced for the district court as a summary judgment exhibit, the official description of the program being challenged was one of "Limited Duty." As indicated in the Petition and in the lower courts' opinions, the Limited Duty program was also referred to as a "transitional duty" or "light duty" policy. The term "light duty" will continue to be used here insofar as it has been the term most commonly used since this litigation began back in 1995.

In substance and practice, however, Continental's light duty policy can also be very accurately described as an *anti*-workers' compensation program, insofar as a major effect – and apparently a major intent – was to reduce the monetary benefits paid to recuperating workers. In other words, it appears that the policy's

[3] *See* TEX. LAB. CODE §§ 401.001-418.002 (Texas Workers' Compensation Act).

primary benefit to Continental has been to keep workers with job-related injuries on the jobsite, such that the payments coming specifically out of workers' compensation funds would be decreased.

With that understanding, suspicions must arise as to Continental's claim that it is merely providing a unique reward for the "sacrifice" of employees injured on the job and, for those employees only, a method that "eases their transition . . . to normal, unrestricted duty." *See* Resp. Brf. at 16. Of course, if there were a *true* recognition of "sacrifice," the benefits paid to the worker might bear some proportionate relationship to the amount of pain and suffering endured from a particular injury. However, as Continental is acknowledging by its newfound label for the program, the benefits Continental actually pays to such workers are no more and no less than is required by the workers' compensation laws. Moreover, if the purported need to "ease their transition" were a *true* concern, more consideration might be given to allowing an injured employee to recuperate without having to worry about working through the injury. On the other hand, to the extent that an employee's subjective feelings through the "transition" *is* a legitimate concern, there is no conceivable, *non-cost-based* reason why a pregnant employee like Ms. Urbano (or any other worker who did not suffer an on-the-job injury) would not have a similar interest in such benefits – or a similar desire for a continuing paycheck. This Court can simply refer to the Petition for a discussion of why a cost-based rationale contravenes the Pregnancy Discrimination Act, given the holding in *International Union v. Johnson Controls*, 499 U.S. 187 (1991). *See* Petition at 13-15.

C. A ruse is a ruse is a ruse

Even if Continental had called its light duty policy a "workers compensation program" from the outset, that policy – as implemented – would be no less discriminatory, and no less violative of the PDA's mandate that any comparison be limited to employees' "ability or inability to work." *See* 42 U.S.C. § 2000e(k). No matter how official-sounding Continental now wishes to re-designate its flawed program, the fact remains that such a policy was voluntarily implemented with either intentional or reckless disregard for its effect on pregnant employees such as Ms.

Urbano. The plain language of the PDA demands a rejection of that policy as applied to Ms. Urbano.[4]

This is probably an appropriate time to explain the significance of Ms. Urbano's co-worker, Peggy Johnson, given that Ms. Johnson's situation provides added evidence of the pretexts underlying the light duty policy; Continental's explanation of the situation is confused. *Cf.* Resp. Brf. at 2 n.3. Specifically, Continental references evidence consisting of a list of forty-eight employees (including Peggy Johnson) who received light duty *in 1994*, and then triumphantly (albeit bewilderingly) notes that Peggy Johnson suffered a job-related injury and received light duty in September of *1995*. *Id.* That discussion completely misses the point. Ms. Urbano's contention does relate to the provision of light duty to Peggy Johnson *in 1994*, but traces it to its more logical connection: evidence that Ms. Johnson suffered an injury *in 1994* for which no job-related cause was established. Such evidence of the policy's arbitrary use should have defeated summary judgment.

As that same list of forty-eight workers who received light duty (including ones with medical lifting restrictions like Ms. Urbano's) provides statistical evidence of a disparate impact, there is another number that is even more significant: Zero. That is how many pregnant women could ever take advantage of the light duty policy based on their pregnancy, given that *pregnancy is simply excluded from the equation*. Ms. Urbano would submit that that might be the *ultimate* statistic in a disparate impact claim under Title VII.[5]

III. WHAT WE REALLY WANT.

Whether resulting from a simple misunderstanding, or overzealous advocacy, many of the assertions in Continental's Brief mischaracterize Ms. Urbano's arguments as they relate to the facts, the challenged opinions, and the cited case law. Petitioner reasserts that the contentions within the Petition are very straightforward, and

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[4] Insofar as Continental asserts that putting pregnant women in the top category of benefits would impermissibly discriminate against workers with off-the-job injuries or illnesses, it is worth noting that one option for this Court may be to declare the program invalid as a whole, not just as it applies to pregnant women.

[5] *Contra* Resp. Brf. at 5-6 (stating there was "no statistical evidence"); Petition App'x at 12a-13a (district court unclearly explaining whatever test it used).

no more complicated than any fair reading would suggest. Yet, in many instances, it appears that Continental "just doesn't get it."

A. Ms. Urbano's actual arguments

The primary argument under the PDA by Ms. Urbano is simply that this Court should look at the correct comparison: whether beneficiaries of the light duty policy were "similarly situated" with her (as a pregnant woman) based on the test used under the PDA – *the "ability or inability to work."* *Accord* Petition at 8-12. The repetitive assertions by Continental that pregnant women are denied benefits to the same extent as employees with off-the-job injuries or illnesses is completely irrelevant. *Cf.* Resp. Brf. at *i*, 3, 7, 12, 15. It is on the *actual* question presented of what it means to be "similarly situated" that the Fifth and Sixth Circuits are now split, as demonstrated very emphatically by the language of the opinion below, wherein Judge Edith Jones declared that "the Sixth Circuit effectuates discrimination contrary to the PDA." Petition App'x at 6a (138 F.3d at 207).

Another mischaracterization of Ms. Urbano's position is the assertion that she is asking this Court to reject two prongs of the *McDonnell Douglas* test. *See* Resp. Brf. at 10. That is completely inaccurate. The *McDonnell Douglas* test has been the law for a quarter of a century, and Ms. Urbano is not attempting to change it now. The concern raised before this Court is that the courts below misapplied the facts *in relation to* the *McDonnell Douglas* test. Indeed, the second and fourth prongs – how Ms. Urbano demonstrated that she is qualified for the benefits denied and "similarly situated" with the actual beneficiaries – are the focus of the first two questions presented by the Petition. *See* Petition at i, 8-12. As for another of Continental's accusations – that Ms. Urbano seeks to avoid a showing of pretext – the Petition contains detailed discussions of the evidence in the record that would suggest pretext, but which the lower courts simply ignored. *Compare* Resp. Brf. at 11 *with* Petition at 4, 5, 6, 14-15, 16-17.

Finally, it is worth noting that the underlying challenge stems from a summary judgment ruling that "no genuine issue as to any material fact" existed. *Cf.* FED. R. CIV. P. 56(c). Accordingly, Ms. Urbano does not seek "another bite at the apple of evidentiary

review" – because it is her position that the district court and the Fifth Circuit were not supposed to weigh the evidence and make "findings" in the first place. *See* Resp. Brf. at 18; *see also generally Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ."). To the extent that the lower courts took a result-oriented approach and made credibility determinations, or simply ignored the evidence indicating the existence of genuine and material fact issues, the lower courts' rulings should be reversed.

B. Other irrelevancies raised by Continental

Whether characterized as red herrings or fish tales, Continental's Brief in Opposition muddies the waters of this appeal by mentioning countless irrelevant issues.[6] Ms. Urbano prays that this Court resists the temptation to nibble at the bait.

One irrelevancy repeatedly mentioned by Continental is the fact that the mid-level manager (Kimberly Joseph) who signed Ms. Urbano's termination letter was pregnant at the time. Resp. Brf. at *i*, 4 n.4, 6, 18. Ms. Urbano has never asserted that Continental fired pregnant women with desk jobs who might not need work accommodations. The central complaint is that the company-wide policy discriminated against pregnant women who *did* need accommodations like those granted to others with job-related injuries or illnesses. Moreover, the evidence before the lower courts included deposition testimony from Ms. Joseph indicating she was not the sole "decisionmaker," but part of a process involving other supervisors and managers. *Cf.* Resp. Brf. at 4 n.4, 18.

Another superfluous contention is that Ms. Urbano should simply accept Continental's discriminatory policy and go back to work for them. *See* Resp. Brf. at 5. That is completely unrealistic

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[6] The problem is not helped by Continental's illusion of precision, by using citations to a record that its counsel is aware is not yet before this Court. Moreover, Continental's charge that the Petition misstates and omits "crucial facts" is, at best, inconsistent with Continental's initial decision to waive the right to file a response or challenge Ms. Urbano's representation of *any* facts – especially in light of the duty imposed by this Court's rules obligating counsel to clarify the facts for this Court. *Compare* Resp. Brf. at 5 *with* S. Ct. R. 15.2.

and counter-intuitive, in a situation where (1) Ms. Urbano was already the target of one retaliatory firing and (2) she had the ability to get pregnant again – only to be subjected to the same hardships and denial of benefits. The comment that Ms. Urbano "remains a full-time homemaker" (who could presumably go back to Continental) is just plain wrong. *Id.* After a lengthy job search, Ms. Urbano found employment elsewhere in the travel industry, where she has remained for approximately the last two years.

There is no merit to the added suggestion that Ms. Urbano is somehow at fault for not calling Continental after being terminated; Continental says that she should have recognized the "obvious error." *Id.* at 4. However, in light of the complete denial of light-duty benefits, immediate and forced use of leave time, and denial of health benefits, a firing one day after Continental received Ms. Urbano's EEOC charge was fully consistent with her understanding of Continental's uncaring treatment of pregnant employees.

Along those same lines is another of Continental's contentions regarding the termination, which is particularly interesting. That is, Continental now asserts that "contrary to" the statement in the Petition that Continental "lost" all evidence of the basis for the termination letter, Continental simply "no longer had the lists." Resp. Brf. at 4 n.4. Although this may be a distinction without a difference, Ms. Urbano simply gave Continental the benefit of the doubt that the missing information was "lost," because the only other alternatives are more pernicious: that Continental destroyed the information, intentionally concealed the information, or simply fabricated its existence to begin with. Although this Court can make whatever assumption it wants, the undisputed fact is that the missing documents were not available as evidence to support Continental's key contention of an "inadvertent" firing.

IV. "THE WHOLE WORLD IS WATCHING": THIS CASE IS INDEED WORTHY OF CERTIORARI REVIEW.

In several instances within the Brief in Opposition, Continental asserts that the issues raised by the Petitioner are "unworthy of," "not deserving of," or "not appropriate" for review by this Court. *See* Resp. Brf. at 8, 10, 15, 17, 18, 19. Such a condescending view of this case is unwarranted in light of what is at stake.

As reflected by the Petition, jurisdiction of Ms. Urbano's appeal to this Court is predicated on several well-established precepts of certiorari review: conflict with the language of a federal statute, conflict with prior decisions of this Court, and conflict with the decisions of other Circuits. *See* Petition at 11, 13, 15, 17, 19, 20; *accord* S. CT. R. 10(a, c). This is not simply a theoretical exercise, or an issue of "semantics." *Cf.* Resp. Brf. at 8, 17. There are wide-ranging, real-world consequences to this Court's ultimate decision in this case.

For instance, as reflected by Ms. Urbano's fourth Question Presented, the split in the circuits regarding *Hicks* is real, and has generated extensive academic commentary. *See* Petition at i, 17-18; *see also, e.g.*, *Developments in the Law – Employment Discrimination*, 109 HARV. L. REV. 1568, 1597-1602 (1996); Thomas Duley, *Summary Judgment and Title VII after* Hicks*: How Much Evidence Does it Take to Make an Inference?*, 28 U.C. DAVIS L. REV. 261 (1994); Jody H. Odell, *Between Pretext Only and Pretext Plus: Understanding* St. Mary's Honor Center v. Hicks *and its Application to Summary Judgment*, 69 NOTRE DAME L. REV. 1251 (1994).

Moreover, as reflected by Ms. Urbano's fifth Question Presented, the nationwide split in the circuits regarding retaliation claims and "suspicious timing" is real as well. *See* Petition at i, 19 (citing a sampling of almost a dozen conflicting cases from nine different federal circuit courts). Many courts have acknowledged the necessity of indirect evidence of intent in Title VII cases, such as "suspicious timing," because the underlying accusation is inherently difficult to resolve. *E.g.*, *United States Postal Serv. Bd. Of Governors v. Aikens*, 460 U.S. 711, 716 (1983) ("There will seldom be 'eyewitness' testimony as to the employer's mental processes."). Chief Judge Posner of the Seventh Circuit has articulated the reality of the situation very well:

> [S]uspicious timing . . . [is among] the most common type of evidence in an intentional discrimination case, now that employers have taught their supervisory employees not to put discriminatory beliefs or attitudes into words oral or written.

Troupe v. May Dep't Stores Co., 20 F.3d 734, 736 (7th Cir. 1994) (further noting that such evidence can be "sufficient by itself . . . to support a judgment for the plaintiff").

Contrary to Continental's implication, the lower courts' rulings do indeed reflect a rejection by the Fifth Circuit of the importance of "suspicious timing." *Cf.* Resp. Brf. at 17-18 (asserting that Petitioner's counsel "comes perilously close to failing to be candid with this Court"). The district court's doublespeak of declaring that "timing . . . may be a significant, but not necessarily determinative, factor," was clarified by the court's ultimate conclusion that Ms. Urbano's presentment of "no evidence, *other than* the close timing" rendered her showing to be "insufficient" to preclude summary judgment. Petition App'x at 14a-15a (emphasis added); *see also id.* at 16a (reflecting same conclusion on FMLA retaliation issue). As a practical matter, such a declaration that timing as brief as a *one-day* turnaround is "significant" has no meaning if it is still regarded as legally "insufficient" to allow the case to proceed to a jury.

Current and future litigants, along with the federal judiciary, would greatly benefit from the guidance provided by a concise rule on "suspicious timing" articulated by this Court. Of course, Ms. Urbano herself seeks to be the initial beneficiary.[7]

As a further testament to the "worthiness" of this matter, the potential impact of the lower courts' rulings also spurred the participation of several amici curiae at the Fifth Circuit level[8]; it is reasonable to assume that many of the same amici would seek to provide additional briefing assistance if this Court decides to grant certiorari. The compelling nature of this case has even attracted national media attention to Ms. Urbano, causing her and her family to be the subject of a featured segment on a national news telecast

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[7] Contrary to Continental's assertion, Ms. Urbano has not waived, her claims under the FMLA. *See* Resp. Brf. at 1 n.2. In fact, her retaliation claim encompasses both the PDA *and* the FMLA, insofar as both were raised in the same EEOC filing. *Accord*, 29 U.S.C. § 2615(a, b) (prohibiting retaliation under the FMLA).

[8] The amici curiae included (1) the Women's Legal Defense Fund, (2) the American Civil Liberties Union Foundation Women's Rights Project, (3) the National Women's Law Center, (4) the NOW Legal Defense and Education Fund, and (5) the Women's Law Project.

as this case was pending in the Fifth Circuit. *NBC Nightly News with Tom Brokaw: "The Sex War – Pregnancy"* (NBC television broadcast, Oct. 24, 1997, story reported by Andrea Mitchell).

The additional irreconcilable conflicts raised in the Petition are more than just "semantics," as Continental attempts to downplay them.[9] *See* Petition at 8-11 (discussing conflict with plain language of the PDA), 11-13 (discussing conflict with *Ensley-Gaines*), 13-15 (discussing conflict with *Johnson Controls*). Ms. Urbano reiterates the significant nature of this case not only for herself, but for victims of workplace discrimination across the United States.

V. "JUST WALK BESIDE ME"[10]: A CONCLUSION.

While fervently asserting that Continental's light-duty policy impermissibly relegates her to a status behind other temporarily disabled workers, Ms. Urbano does not view, nor seek, preferential treatment as the only alternative. All Ms. Urbano asks of this Court is to apply the plain language that is *already* in the PDA and Title VII, and acknowledge her equal right to benefits that Continental was *already* providing to other workers. Ms. Urbano also believes that she was entitled to assert that right without being the subject of a retaliatory firing. Without annoying this Court further on the issue of which counsel's characterizations are more faithful to the actual record, Ms. Urbano simply asks this Court to review the factual assertions objectively, review the cited cases, and review the plain language of the controlling statutes. We are confident that, after such review, this Court will recognize the significance of the claims made by Ms. Urbano and the irreconcilable conflicts between the judgments below with over a dozen cases from other Circuits and this Court. Ms. Urbano hereby again requests that this Court grant her request for a Writ of Certiorari.

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[9] It is interesting that Continental cites the key Sixth Circuit case of *Ensley-Gaines v. Runyon*, 100 F.3d 1220 (6th Cir. 1996) only once in a footnote, despite the fact that the Fifth Circuit opinion being challenged devotes four paragraphs to criticizing it as a basis for its ruling. *Compare* Resp. Brf at 7 n.9 *with* Petition App'x at 5a-7a (138 F.3d at 207-08). Continental even concedes the irreconcilable, inter-circuit conflict in the same footnote, if only to say that the basis for certiorari review would be "to overturn [that] poorly-reasoned opinion."

[10] The reference is from a short poem by Albert Camus, entitled "Friends."

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